APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 1, 1992 Decided May 28, 1993

No. 91-5263

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
NATIONAL ASSOCIATION OF BROADCASTERS,
Appellants

No. 91-5264

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
CONSUMER FEDERATION OF AMERICA,
Appellants

No. 91-5265

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
COMPUSERVE INCORPORATED,
Appellants

No. 91-5266

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
THE DUN & BRADSTREET CORPORATION,
Appellants

No. 91-5267

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
MCI COMMUNICATIONS CORPORATION,
Appellants

No. 91-5268

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Appellants

No. 91-5269

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
NEWSPAPER ASSOCIATION OF AMERICA,
Appellants

No. 91-5270

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
PRODIGY SERVICES COMPANY,
Appellants

No. 91-5271

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
ADAPSO, THE COMPUTER SOFTWARE AND
SERVICES INDUSTRY ASSOCIATION, INC.,
Appellants

No. 91-5272

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
ALC COMMUNICATIONS CORPORATION,
Appellants

No. 91-5273

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
INFORMATION INDUSTRY ASSOCIATION,
Appellants

No. 91-5279

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, GE COMMUNICATIONS & SERVICES,

Appellants

No. 91-5280

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, COX ENTERPRISES, INC.,

Appellants

No. 91-5281

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*, DIALOG INFORMATION SERVICES, INC.,

Appellants

No. 91-5282

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*, ASSOCIATION OF NORTH AMERICAN DIRECTORY PUBLISHERS, INC.,

Appellants

No. 91-5283

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
ALARM INDUSTRY COMMUNICATIONS COMMITTEE,
Appellants

No. 91-5284

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
WEST PUBLISHING COMPANY,
Appellants

No. 91-5285

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
LO-AD COMMUNICATIONS OF CALIFORNIA, INC.,
AND LO-AD COMMUNICATIONS OF NEVADA, INC.,
Appellants

No. 91-5286

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
MCGRAW-HILL, INC.,
Appellants

No. 91-5287

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
MEAD DATA CENTRAL, INC.,
Appellants

No. 91-5288

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
COMMERCE CLEARING HOUSE, INC.,
Appellants

Appeal from the United States District Court
for the District of Columbia

(C.A. 82-00192)

Chester T. Kamin, with whom *Bruce J. Ennis, Jr.*, *Michael H. Salsbury*, *Richard E. Wiley*, *Michael Yourshaw*, *William B. Baker*, *H. Bartow Farr, III*, and *Richard G. Taranto* were on the joint brief, for appellants. *Barbara L. Waite*, *Michael A. Jacobs*, *Ann J. LaFrance*, *Andrew D. Lipman*, *Richard M. Ridler*, *Jonathan W. Cuneo*, *Howard D. Polsky*, *Sue D. Blumenfeld*, *Robert P. Reznick*, *Werner K. Hartenberger*, *Laura H. Phillips*, *Alexander Humphrey*, *Robert J. Butler*, *Roy L. Morris*, *Joseph P. Markoski*, *W. Terry Maguire*, *Brenda L. Fox*, *Randolph J. May*, *Gene Kimmelman*, *Henry L. Baumann* also entered appearances for appellants.

Peter G. Wolfe entered an appearance for Public Service Commission of the District of Columbia.

Frank W. Lloyd, III entered an appearance for intervenor Leghorn Telepublishing Company.

John Glynn, Gary L. Lieber, and *Robert L. Duston* entered appearances for intervenor Maryland People's Counsel.

Nancy C. Garrison, Attorney, Department of Justice, with whom *Catherine G. O'Sullivan,* Attorney, Department of Justice was on the brief, for appellee United States of America.

Laurence H. Tribe, with whom *Stephen M. Shapiro, Michael K. Kellogg, Walter H. Alford, Mark K. Hallenbeck, Richard W. Odgers, Margaret deb. Brown, Jeffrey S. Bork, John Thorne, Raymond F. Burke, Gerald E. Murray, James D. Ellis, Liam S. Coonan, Ann E. Meuleman,* and *Martin E. Grambrow* were on the brief, for appellees Bell Operating Companies.

Phillip D. Mink entered an appearance for intervenor Action for Children's Television and Citizens for a Sound Economy Foundation.

Herbert E. Marks and *James L. Casserly* entered appearances for intervenor Independent Data Communication Manufacturers Association, Inc.

David W. Carpenter entered an appearance for intervenor American Telephone and Telegraph Company.

John W. Pettit and *Thomas K. Crowe* entered appearances for intervenor Tandy Corporation.

Laurence H. Tribe and *Michael K. Kellogg* entered appearances for intervenor Ameritech, Bell Atlantic, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell and US WEST, Inc.

Kathleen F. O'Reilly entered an appearance for intervenor Wisconsin Citizens' Utility Board and Toward Utility Rate Normalization.

Phillip D. Mink was on the brief for intervenor and *amicus curiae* Regional Telephone Company.

Robert Abrams, John R. Perkins, Robert T. Stephen, and *Thomas Udall* were on the brief, for *amicus curiae* Twenty-Seven States.

Robert L. Pettit, General Counsel, *Renee Licht,* Deputy General Counsel, and *John E. Ingle,* Deputy Associate General Counsel, Federal Communications Commission were on the brief, for *amicus curiae* Federal Communications Commission.

Martin T. McCue, General Counsel, and *Rodney L. Joyce,* United States Telephone Association were on the brief, for *amicus curiae* United States Telephone Association.

James B. Gainer, Assistant Attorney General, entered an appearance for *amicus curiae* Public Utilities Commisison of Ohio, State of Ohio, Illinois Commerce Commission, and State of Illinois.

Steven M. Schur, General Counsel, and *Michael S. Varda,* Legal Counsel, Public Service Commission of Wisconsin, entered appearances for *amicus curiae* Public Service Commission of Wisconsin and State of Wisconsin.

L. Andrew Tollin entered an appearance for *amicus curiae* Media Institute.

Bruce J. Weston and *David C. Bergmann* entered appearances for *amicus curiae* National Association of State Utility Consumer Advocates and Office of the Consumers' Counsel State of Ohio.

Before: BUCKLEY, WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, *Circuit Judge*: When the government and AT&T settled the government's antitrust suit against AT&T, the Department of Justice pledged to re-

port to the district court every three years as to whether there was a continuing need for the "line of business" restrictions that the settlement decree, the "Modified Final Judgment", imposed on the Bell operating companies (or BOCs). In 1987 the Department proposed that many of the restrictions be removed, including those on entry into the information services market. The district court rejected the information services. proposal and several others. On review, this court largely affirmed, but reversed and remanded as to information services, finding that the district court had employed the wrong standard in reviewing the Department's proposal. See *United States v. Western Electric Co.*, 900 F.2d 283, 289-93, 305-09 (D.C. Cir. 1990) ("*Triennial Review Opinion*").

On remand, the district court modified the decree, in an opinion that is something of a pushmi-pullyu. See *United States v. Western Electric Co.*, 767 F. Supp. 308 (D.D.C. 1991) ("*Remand Decision*"). While on the one hand asserting that "none of [the Department of Justice's immediate contentions] is supported by credible evidence," *id.* at 330, the court also concluded that under the standard established by this court in the *Triennial Review Opinion* it was bound to defer to those conclusions, *id.* The district court thus removed the ban on entry into information services. It stayed its own order of modification, but this court set the stay aside. *United States v. Western Electric Co.*, 1991-2 Trade Cas. (CCH) ¶ 69,610, 1991 WL 238308 (D.C. Cir. 1991).

A variety of media and information services interests challenge the modification. Although the district court in certain places mischaracterized the standard under which it was to review the Department's proposal, the evidence was such that, under the standard laid down in the *Triennial Review Opinion*, rejection of the Department's proposal would have been error. We affirm.

The standard for review of modifications on mutual consent

Under the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h), know as the Tunney Act, the district court reviewing a consent decree must determine whether the entry of such judgment is "in the public interest." *Id.* at § 16(e). Although application of the Tunney Act to decree modifications has been contested, see Note, Modifications of Antitrust Consent Decrees: Over a Double Barrel, 84 Mich. L. Rev. 134 (1985), all participants have assumed the point, as did we in the *Triennial Review Opinion,* 900 F.2d at 295. There we held that the "public interest test", as applied to a modification assented to by all parties to a decree,[1] "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." 900 F.2d at 307 (emphasis in original). That formulation made clear that it was not up to the court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest. In our final sentence on the standard, we underscored the deferential character of the inquiry:

> The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is one that will *best* serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of the public interest.' "

Id. at 309 (emphasis in original) (citing and quoting *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th

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[1] For this court's identification of "parties" for purposes of the above, see *United States v. Western Electric Co.,* 969 F.2d 1231 (D.C. Cir. 1992).

Cir. 1981), in turn quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)).

The appellants address the standard of review issue by selectively citing other language in the *Triennial Review Opinion*, assigning an absurd meaning to that language, and contending that therefore the language could not really be read to describe the standard for judicial evaluation of an uncontested modification. Finally—the point of their exercise—appellants leap to the conclusion that once we have banished the whipping boy of their creation, nothing will remain except a standard of de novo judicial evaluation. See Appellants' Brief at 54-68.

The language out of which appellants spin this argument is our statement that "Because the 'public interest' test must take its meaning from the nation's antitrust laws . . . , the appropriate question . . . is whether the proposed modification would be *certain* to lessen competition in the relevant market." *Triennial Review Opinion*, 900 F.2d at 308 (emphasis added). By reading "certain" to imply absolute certainty, appellants give the language a meaning that would extinguish Tunney Act review. Indeed, the district court voiced the same idea, saying that "the certainty standard may well be an impossible one". *Remand Decision*, 767 F. Supp. at 331. See also *id.* at 330-31 & n.116 (saying that our decision required opponents of noncontested modification to establish anticompetitive effects even more persuasively than under the "beyond-a-reasonable-doubt standard applicable to criminal cases").

This notion of utter certainty, and its correlative of abject deference to the Department, is a straw man. The focus of the disputed sentence was the nature of the factors that fit within the "public interest", which the court explained were antitrust considerations—the probable effects on competition within the relevant market. The sentences of the *Triennial Review Opinion* that address the role of the district court in relation to Department of Justice submissions (the passages quoted above

on the "*zone*" of settlements that fall within the "*reach*" of the public interest) make clear that the district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency. *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103, 103 S. Ct. 2246, 2255, 76 L. Ed. 2d 437 (1983) (when examining predictions within an agency's expertise, "a reviewing court must generally be at its most deferential"); *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982); *NARUC v. FCC*, 525 F.2d 630, 638-39 (D.C. Cir. 1976). We recognize that we are not, strictly speaking, reviewing agency action. However, as the Antitrust Division's assessment of likely competitive effect involves the same kind of predictive judgment, and the court's role is similarly secondary, that relation at least provides a helpful analogy.

The above view accords with other courts' understanding of the court-agency relation under the Tunney Act. As the Ninth Circuit found in *Bechtel*, "The balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." 648 F.2d at 666. And in *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977), while the court spoke of making an "independent public interest determination", it also found that it was not "to make *de novo* determination of facts and issues", and that its task was to determine whether the Department of Justice's explanations were "reasonable under the circumstances." *Id.* at 71,979-80. See also *United States v. Yoder Bros. Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 at 61,795 (N.D. Ohio 1986).

Insofar as appellants claim that the deferential standard adopted in the *Triennial Review Opinion* (and in *Bechtel* and the other cases noted above) is at odds with

the Tunney Act and other judicial interpretations, see Appellants' Brief at 28-54, the claim is one that they must pursue either by a suggestion for rehearing *en banc* or by petition for certiorari. We briefly note one special aspect of their argument, however. They suggest that it is inappropriate to defer to the Department when it is acting in a litigation mode, citing *Crandon v. United States*, 494 U.S. 152, 177-78, 110 S. Ct. 997, 1011, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring). Here the appellants are looking into the wrong end of the telescope. Parties to a contract have voluntarily decided to modify it; the interesting question is not why courts should allow modification, but why they should consider upsetting it. The answer appears to lie in the judicial involvement in the process. Cf. *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683, 689, 81 S. Ct. 1309, 1312, 6 L. Ed. 2d 604 (1961) (review to assure absence of bad faith or malfeasance in entry of consent decree); Note, Modifications of Antitrust Consent Decrees: Over a Double Barrel, 84 Mich. L. Rev. 134, 146 (1985) (arguing that judicial role in modification is grounded in consent decree's having itself been a judicial act). We need not explore these issues further, except to say that, even apart from the circuit law established in the *Triennial Review Opinion*, appellants are wide of the mark in supposing that courts should approach the parties' agreement to a modification with the same wariness as they would an adversary party's litigating position.

Insofar as appellants argue that our *Triennial Review Opinion* did not impose a standard of "strict certainty", see Appellants' Brief at 61, of course we agree—at least if that is understood to involve more deference than is conventional between court and agency on expert, predictive judgments. Despite the phrases quoted above from the *Remand Decision*, it is unclear what deference the district court actually extended. If it had demanded absolute certainty, i.e., indulged in total, rubber-stamp def-

erence, we would have to remand for reconsideration under the correct standard—*unless* the record before the court was such that any district court rejection of the proposed modification would have been reversible error. See *Pullman Standard v. Swint*, 456 U.S. 273, 292, 102 S. Ct. 1781, 1792, 72 L. Ed. 2d 66 (1982). In fact the record satisfies that standard. Accordingly we need not enter the elusive inquiry as to what standard the district court "really" applied. Nor need we consider the scope of our review of the district court findings. Although Fed. R. Civ. P. 52 prescribes the "clearly erroneous" standard for actions tried to the court without a jury, the better analogy may be to appellate review of district court application of the "substantial evidence" standard. In that context the district court decision drops out and the appellate court reviews the agency decision directly, its sole deference being to the agency. *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991); *Costello v. Agency for Int'l Development*, 843 F.2d 540, 543 n.5 (D.C. Cir. 1988). We need not address the issue of deference to the findings of the district court, however, for to the extent that they contradict the Department's conclusions they are indeed clearly erroneous.

Record evidence on the effects of removing the ban on entry into information services

In advocating removal of the information services ban, the Department made the following contentions: (1) that there was no substantial risk that removal of the ban would lessen competition either through the BOCs' use of their "bottleneck" power over local loop connections (i.e., intra-exchange services) to discriminate against competing information service providers, or through cross-subsidization of their own information services; (2) that under current conditions regulation would play a substantial role in minimizing any anti-competitive risks; and (3) that removal of the ban would benefit consumers by en-

hancing competition in information services. See Memorandum of the United States in Support of Motions for Removal of the Information Services Restriction, Joint Appendix ("J.A.") 797; see also *Remand Decision,* 767 F. Supp. at 330.

Participants on all sides of the dispute submitted affidavits on these issues, many by very distinguished economists. The issue before the court was limited: to determine whether the Department's views were well enough substantiated that it (the Department) could reasonably conclude that removal of the ban was in the public interest. The issue before us, under our self-imposed burden of deference to the district court, is whether that court was clearly erroneous to the extent that it found the Department's conclusion unreasonable.

(1) *BOC power to discriminate against competing information service providers and to cross-subsidize.* It is undisputed that the BOCs have monopolies over local telephone exchange service in their respective service areas. *Remand Decision,* 767 F. Supp. at 314-15. The district court was convinced that the BOCs could use that monopoly power to raise the transmission costs of any rival information service provider, thereby raising the costs and reducing the output of information services. *Id.* at 315. Raising the costs could take the form either of raising prices explicitly or degrading service (as by delayed installation of equipment, low priority restoration of service after an outage, or poor maintenance). See Fisher Aff., par. 15, J.A. 2031-32.

In assessing the ability of BOCs to raise rivals' costs, we assume arguendo that devices for avoiding the local loop altogether, such as satellite dishes, are inadequate. See *Remand Decision,* 767 F. Supp. at 315. But the record provides strong support—which the district court did not address at all—for the view that, quite part from such end-runs, BOCs will be unable to discriminate against competing providers. Such discrimination could

theoretically occur at either end of the information service transaction—the provider's or the customers'. Take the provider's end first. Professor Fisher notes that providers may prevent such discrimination by exploiting competition between BOCs, and between BOCs and non-BOC telephone companies, by moving or threatening to move their distribution facilities (the point where their information is fed into the telephone system) to a different region or to an independent company within the BOC's region. Fisher Aff., pars. 14-16, J.A. at 2031-33. Further, as Professors Stigler and Carlton say, large information service providers not only can but already do bypass the BOCs by constructing private networks. Two of the appellants' primary experts acknowledge the ability of high-volume providers to use by-pass to defeat any discrimination attempts. See Hall Aff., at 16, J.A. 2167; Noll Aff., at par. 8, J.A. 2584. While some providers may well be too small to defeat discrimination this way, it is hard to see what advantage a BOC could draw from beating down small rivals whose customers could readily shift to the BOC's larger competitors. Carlton Stigler Aff., pars. 34-35, J.A. at 1857-58.

This takes us to the customer end. See Noll Aff., par. 8, J.A. at 2584. Despite the local monopoly, the record indicates that even here there is much to undercut the threat of discrimination. First, it is evidently difficult, if not impossible, for BOCs to distinguish between information service provider messages and others, as both may come over regular voice lines. Carlton Stigler Aff., par. 28, J.A. at 1854; Hausman Aff., par. 34, J.A. at 2235. Moreover, as Professor Fisher notes, a BOC would not only have to distinguish between voice and data messages, but also between those data messages coming from a competitor and those from a noncompetitor (e.g., interoffice transmissions by corporations). Fisher Aff., par. 17, J.A. at 2033. The necessary scale of BOC detections would be enormous; Fisher observes that on one information system alone (DunsNet) customers gain access 60,000 times a day. *Id.* at par. 18, J.A. 2033-34.

The discrimination hypothesis appears to assume, moreover, that local interconnections are a major element of the total costs of providing information services. This seems untrue. One major information service provider well-known to lawyers, Commerce Clearing House, reports that only 15-20% of its costs are due to telecommunications, of which 30% are local exchange costs. Fisher Aff., par. 19, J.A. at 2034. Thus only about 4.5% to 6% of CCH's costs are susceptible to BOC discrimination. Even a 50% increase in local exchange costs would raise CCH's costs by only 3%. Another affiant cites evidence that local exchange costs amount to only 1% of providers' total costs. See Hausman Aff., par. 24, J.A. 2231.

The BOCs also offered evidence that non-BOC local exchange companies such as GTE have entered the information services market without using their bottleneck control anti-competitively. *Remand Decision,* 767 F. Supp. at 316. The district court dismissed the GTE experience on the ground that GTE had no ability or incentive to discriminate due to its "dispersed geographical base." *Id.* at 321; see also *United States v. GTE Corp.,* 603 F. Supp. 730, 734 (D.D.C. 1984). The distinction is far less compelling than it first appears, as its validity depends on the idea that local exchange dispersion would make it materially easier for an information service provider to escape from discrimination at the provider end. As we have already seen, however, the providers' means of escape from the BOCs are quite good—all that need be relocated is the origin of the provider's distribution system. Further, the difference in degree of dispersion is by no means overwhelming. First, the BOCs are not AT&T, but seven independent and potentially competing companies, each of which has independent telephone companies operating within its region. Fisher Aff., at par. 16, J.A. 2032-33. Second, GTE itself is not the totally scattered entity envisioned by the district court. As this court has previously noted, GTE controls local exchange service in the

entire state of Hawaii as well as in large portions of the Tampa and Los Angeles markets. *Illinois Bell v. FCC*, 883 F.2d 104, 112 n.6 (D.C. Cir. 1989); Fisher Aff. at par. 54, J.A. 2055-56. The evidence assembled by Professor Fisher shows that none of the anti-competitive consequences hypothesized by the district court have come to pass with GTE or other independent telephone companies, despite their entry into the information services market. Fisher Aff., pars. 53-63, J.A. at 2055-61.

Bafflingly, the district court characterized the BOCs' evidence on the bottleneck issue as "half-hearted", *Remand Decision*, 767 F. Supp. at 316, with barely a mention of the analyses we have just described. The affidavits in the record offer persuasive evidence that, despite their local monopoly power, the BOCs will be unable to discriminate against competing information service providers.

The district court also alluded to a cross-subsidy theory that was by no means central to appellants' objections—the possibility that BOCs might discourage others' entry by "acquiring a reputation for strategic predatory pricing" (by responding to entry by lowering prices), financing the predation by shifting costs to its price-regulated monopoly operations in the local loop. See *Remand Decision*, 767 F. Supp. at 315 (citing Hall Aff., pp. 4-5, J.A. 2155-56). The Hall Affidavit is brief and conclusory on the point. Strikingly, one of the appellants' affiants parried a BOC affidavit on predatory pricing by saying that predation was a "straw man" and that he was "inclined to agree" with the proposition that "the risk of classic predatory pricing alone" did not justify retention of the ban. Shapiro Aff., par. 62, J.A. at 2669. As we shall see, the pro-BOC affiants addressed the cost-shifting hazard in their treatment of regulatory constraints, to which we now turn.

(2) *Efficacy of regulation.* The BOCs and the Department of Justice pointed to regulatory safeguards that could limit anticompetitive effects even if the BOCs other-

wise had the incentive and ability to discriminate or cross-subsidize. The district court dismissed these contentions. It believed instead that regulators had never been successful in stopping the Bell system from engaging in anti-competitive activities, and that there were no changes tending to enhance their ability to do so. It disposed of references to current FCC rules that require the BOCs to charge themselves the same access rates as they charge others, for instance, with the observation that a comparable rule did not work *before* the Bell system break-up. *Remand Decision*, 767 F. Supp. at 317-18. Indeed, the court believed that the increasing complexity and diversity of the industry, including BOC entry into other fields, might make it harder than ever to detect or stamp out discrimination and cross-subsidization. See generally *id.* at 317-22.

There is a lot of evidence that the break-up and other recent developments have enhanced regulatory capability. The seven independent BOCs are *not* the old AT&T. As this court noted in the *Triennial Review Opinion*, the existence of seven BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing. See *id.*, 900 F.2d at 299. Indeed, federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements (i.e., the requirements disparaged by the district court) and in comparing installation and maintenance practices for customer premises equipment. See Arrow/Rosenfield Aff., par. 43, J.A. 1764; Grossman Aff., par. 28, J.A. 2146; Carlton/Stigler Aff., par. 44-45, J.A. 1863-64. Moreover, information service giants operating throughout the country, such as IBM, AT&T and GE, will notice any discrepancies in treatment by the various BOCs and will have the capacity and incentive to bring anticompetitive conduct to the attention of regulatory agencies. *Id.* at par. 47, J.A. 1864-65. The BOCs themselves will be each other's customers in the transmission of information services, with a unique capacity to spot misbehavior and

notify regulators. *Id.* at par. 48, J.A. 1865. Finally, any effort to establish a reputation for predatory responses to new entry will require that potential new entrants be aware of such predation; a BOC may have great difficulty establishing such a reputation among potential entrants while keeping it a secret from regulators. Carlton/Stigler Aff., par. 62, J.A. 1872.

Changes independent of the AT&T break-up also support the likelihood of more effective regulation. For example, Professor Kahn pointed to the FCC move in the direction of price cap regulation, which the FCC has in fact extended to the BOCs since his affidavit. See *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 179 (D.C. Cir. 1993). This reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling. Kahn Aff., par. 16, J.A. at 2393-94; Hausman Aff., pars. 32-33, J.A. 2260-61; *National Rural Telecom Ass'n*, slip op. at 8-9. In addition, the FCC has acted since the break-up to tighten its accounting rules, especially its treatment of joint costs, all tending to increase the chances of catching any attempts at cost-shifting. Farmer Aff., J.A. 1994-2017.

Similarly, Kahn argued that it was by no means valid to assume the prevalence of regulatory "capture". Noting state agencies' overwhelming concern for keeping the rates for local residential service low, he reasoned that this would inhibit any effort by the BOCs to shift costs into those (monopoly) services. He also noted that nearly every state allowed competitive resale of inter-LATA service—a rule clearly inconvenient to the BOCs and incompatible with an assumption of successful capture. Kahn Aff., pars. 10-11, J.A. 2391. Given Professor Kahn's careful analysis, not to mention his distinguished experience as a regulatory economist, it would take far more than a reference to the district judge's own experience

in the AT&T matter to vindicate his disparagement of Kahn's testimony as "completely in error". See *Remand Decision*, 767 F. Supp. at 318 n.49.

Of course, proponents of the entry ban submitted affidavits in its favor. The district court attached preeminent importance to that of Professor Noll, who argued that increasing product diversification would make strategic cost accounting and discriminatory practices hard to detect. Noll Aff., pars. 74-75, J.A. 2597-98; see *Remand Decision*, 767 F. Supp. at 320. The Noll affidavit is striking in that it focuses more on what BOCs might *want* to do than on their actual capacity for achieving it, and it does not truly address the post-break-up environment or developments such as price caps and enhanced FCC accounting rules, see Noll Aff., par. 72, J.A. 2597 (discounting these as either antedating the break-up or not yet adopted).

It is not, however, for use to choose among the opposing positions of distinguished economists. The issue is whether the Department of Justice's position had substantial factual support and was grounded in reasonable analysis. On the proposition that regulation would be a substantial obstacle to anticompetitive behavior, the Department passed this test.

(3) *Competitive benefits of BOC entry.* Parties favoring removal of the ban pointed to substantial benefits that they believed likely to follow. For example, they pointed to several segments of the information services market that are highly concentrated (e.g., alarm services, financial transactions, and airline reservations), arguing that BOC entry would make the market more competitive. Arrow/Rosenfield Aff., par. 23, J.A. 1753. Further, there is reason to believe that BOCs entering the information services market will have some economies of scope (the capacity to produce related goods or services at an aggregate cost lower than the total for each produced separately), with resulting consumer benefits. See Carlton/Stigler Aff., pars. 17-22, J.A. at 1846-50.

The district court brushed these contentions aside as "preposterous", *Remand Decision,* 767 F. Supp. at 326, partly on the theory that BOC competition could contribute no consumer benefit because the BOCs had no prior experience in the content or substance of information services. *Id.* This is a curious idea, as businesses are capable of acquiring expertise and experienced talent. Under the court's view, new entry could rarely create competitive benefits; even a development so close to home as recent entries into long-distance telephone service could not be expected to generate consumer benefits.

Instead of consumer benefit, the court envisioned a nightmare in which the BOCs would drive out the current competitors and perhaps "extinguish[]" competition altogether. *Remand Decision,* 767 F. Supp. at 326. The latter scenario is of course internally contradictory; because there are seven BOCs, competition would exist even if they drove out all the incumbents. More generally, the district court's scenario necessarily depends upon successful use of some combination of discrimination and cross-subsidization; we have already reviewed the obstacles that such efforts would confront.

It is worth noting here the character of some of the firms that the BOCs would have to drive out. They include GE (with annual revenues about five times those of a BOC), AT&T itself (revenues three times those of a BOC), IBM and Sears with their Prodigy service, Merrill-Lynch, ITT, Mead Corporation, American Express, Citicorp, Chase Manhattan Bank, and a variety of foreign and independent telephone companies. Hausman Aff., pars. 11-14, J.A. 2225-26. These firms are not pushovers. Also, we have already noted evidence that local exchange costs represent only a tiny share of information service providers' total costs, so that the BOCs' bottlenecks do not, in perspective, seem like invincible weapons.

If appellants are right, BOC entry will raise prices and reduce output in the information services industry;

if the Department is right, BOC entry will lower prices and expand output. Firms that sell goods and services that are *inputs* to the production and use of information services stand to gain an expanding market if the Department's prediction is right, and have the incentive to make a completely unbiased judgment on the matter. It is something of a vindication of the Department's view that representatives of those firms, the Computer and Communications Industry Association and the United States Telephone Association (which includes about 1000 independent local telephone companies), filed briefs with the district court supporting removal of the ban. See CCIA Brief 17-18, J.A. 78081; USTA Brief 1, 5-7, J.A. 784-87.

We stress again that the judicial role here is *not* to determine whether removal of the information services ban is an optimizing move. Under the arrangements made by Congress, that task (in the present context) is for the Department of Justice, subject to judicial review. The distinguished experts marshalled by the appellants may, in the eyes of an omniscient being, be "right". Conversely, the fact that removal of the ban is supported by an array of prominent economists (including two Nobel laureates, Stigler and Arrow) does not in itself make that action right. The quality of their presentations is enough, however, to establish an ample factual foundation for the judgment call made by the Department of Justice and to make its conclusion reasonable. Insofar as the district court may be considered to have found the contrary, the finding was clearly erroneous.

We affirm the judgment removing the information services line of business restriction from the Modified Final Judgment.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-0192 (HHG)

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
Defendants.

July 25, 1991

OPINION

HAROLD H. GREENE, District Judge.

The issue before the Court in this, the most recent chapter of this antitrust case, is whether the Court should remove the restriction on information services imposed as part of the consent decree. Under a decision of the Court of Appeals, such removal is required if this Court is not able to conclude from the evidence that the entry of the Regional Companies into the presently restricted market would be certain to lessen competition.

I

History

This lawsuit was brought by the Department of Justice on behalf of the United States against the American Telephone and Telegraph Company in November 1974. Fol-

lowing a period of discovery and of pretrial motions, an eleven-month trial began in January 1981. *See generally, United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *affirmed sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed. 2d 472 (1983). Shortly before the taking of evidence was to be concluded, the parties agreed upon and submitted to the Court a proposed consent decree.

The Court held extensive Tunney Act [1] proceedings, in which all organizations, private and public (including twenty-nine States), with an interest in the decree were permitted to intervene and to participate. The Court approved the decree with some modifications on August 24, 1982, and entered it on that date as a final judgment. The Supreme Court affirmed that judgment on February 28, 1983.[2]

The seven Regional Companies,[3] which had inherited all the local telephone companies of the Bell System at the time the System's assets were split up, were subjected under the terms of the decree to several restrictions. These restrictions were based upon the kinds of anticompetitive activities that the local companies had engaged in while they were still a part of the Bell System, or were likely

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[1] Antitrust Procedures and Penalties Act, 88 Stat. 1706, 15 U.S.C. § 16(b)-(h).

[2] The Supreme Court again summarily affirmed this Court's subsequent approval of the AT & T Plan of Reorganization which was drafted under the auspices of the decree. *United States v. Western Electric Co.*, 569 F.Supp. 1057 (D.D.C. 1983), *aff'd, California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983).

[3] From the very outset, this Court has eschewed alphabetical abbreviations which might be incomprehensible to those not directly involved in this litigation, and accordingly it has used the term Regional Companies rather than RBOCs, it has made reference to the decree rather than the MFJ, and the like. The Court will continue to avoid bureaucratic and technical terminology to the extent that it is possible to do so.

to engage in because the ability and the incentive therefor were present. As here relevant, one of the provisions of the decree prohibits the Regional Companies from providing interexchange and "information services," [4] such services being defined as follows:

> "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

552 F.Supp. at 229.

In 1987, in response to an initiative of the Department of Justice, the Court conducted a so-called triennial review of the continuing need for the restrictions imposed by the decree. At that time, again, the Court permitted wide participation in and intervention by interested parties, both private and governmental.

Following that review, the Court removed the restriction on the transmission of information, as well as a comprehensive catch-all restriction on the entry of the Regional Companies into non-telecommunications markets. However, the Court concluded that there was no basis for removing the three "core" restrictions—those on interexchange services, the generation of information, and the manufacture of equipment. *See generally, United States v. Western Electric Co.*, 673 F.Supp. 525 (D.D.C. 1987).

The basic rationale for keeping intact the core restrictions was that the Regional Companies retained their

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[4] "After completion of the reorganization . . . no BOC shall . . . provide interexchange or information services. . . ." Section II(D)(1) of the decree.

monopoly control of the local telephone switches and wires, with the consequence that competitors of these companies in the markets affected by the restrictions could reach their ultimate customers only at the Regional Companies' sufferance. These companies, reasoned the Court, were in the same position as their predecessor Bell System, which "could with ease discriminate against [competitors] by such practices as delaying interconnections, providing inferior connections, charging exorbitant prices, or refusing to attach competitors' products altogether. [The Regional Companies are] also able to subsidize [their] competitive products with funds syphoned off from the monies paid in by the ratepayers. . . ." 673 F.Supp. at 600, 602.

The Regional Companies and several other parties, including the Department of Justice, took appeals. The Court of Appeals affirmed the decisions of this Court on several issues, but it reversed and remanded the issue of information services. *United States v. Western Electric Co.*, 900 F.2d 283 (D.C.Cir.), *cert. denied sub nom. MCI Communications Corp. v. United States*, —— U.S. ——, 111 S.Ct. 283, 112 L.Ed.2d 238 (1990). The appellate tribunal held that, inasmuch as none of the original parties to the consent decree [5] is opposing the removal of the information services restriction, the appropriate provision of the decree to govern judicial decisions with respect thereto is section VII of that decree [6] (which,

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[5] The Department of Justice and AT & T were those original parties, but the Regional Companies which used to be integral parts of AT & T (or the Bell System as it is often referred to) were held to be in the same category.

[6] Section VII of the decree states:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment,

the appellate court said, establishes a public interest standard), rather than section VIII(C)[7] (which deals only with removals of restrictions contested by one of the original parties).[8] 900 F.2d at 295, 305-07.

The Court of Appeals went on to indicate that, in view of the expertise of the Department of Justice in enforcing the antitrust laws, this Court was to defer to that Department with respect to a number of issues.[9] Inasmuch as this Court had in several respects applied legal standards differing from those laid down in the Court of Appeals opinion, the case was remanded for further fact-finding with respect to the information services restriction under the criteria established by the appellate court.

Following the issuance of the appellate mandate, this Court once again entertained briefs from all the parties, including the intervenors which would be affected by the

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for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F.Supp. at 231. This vesting of future jurisdiction in this Court was in the consent decree as drafted by the parties; the Court did not add it to the decree or alter it in any way.

[7] Section VIII(C) provides:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F.Supp. at 231. This section was drafted by the Court and its adoption as part of the decree was made a condition of the Court's approval. *See* 552 F.Supp. at 225.

[8] The Court of Appeals also held that the Department of Justice may not petition for removal of a restriction under Section VIII(C). 900 F.2d at 294.

[9] These issues, and the precise language employed by the Court of Appeals with respect to this subject, are discussed in Part VII-A, *infra*.

decision, and it heard oral argument during two successive days. In addition to their legal arguments, various parties and intervenors also submitted voluminous evidence in the form of affidavits and exhibits.[10] These affidavits, exhibits, and arguments form the basis for the instant decision.

The Court will consider first the various aspects of the substantive issues [11] discussed by the parties to the proceeding.

II

Market Power

The Court of Appeals has stated that the exercise of market power is a necessary prerequisite to damage to competition under the antitrust laws, and that "unless the entering BOC will have the ability to raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power to 'impede competition.' " 900 F.2d at 296. The issue is whether the Regional Companies possess market power within the meaning of that definition.

A. Market Power in General

The Regional Companies note that market power is deemed to exist when there are substantial barriers to

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[10] MCI and the American Newspaper Publishers Association were the only affected parties suggesting that it would be useful to hold an evidentiary hearing, in addition to the written submissions of evidence. MCI's Response to United States Motion for a Briefing Schedule at 2; Reply of the American Newspaper Publishers Association at 3. The Department of Justice affirmatively stated that evidentiary hearings were in its view unnecessary and inappropriate. Reply of the United States at 2. The Court has concluded that it is able to make the findings required by the Court of Appeals on the basis of the affidavits and exhibits that have been filed.

[11] The issues surrounding the Court of Appeals requirements regarding what may generically be called "burden of proof" questions are discussed in Part VII, *infra*.

entry, a large market share, and a paucity of substitutes, and they contend most notably that they presently lack any market share in the information services market and therefore could not possibly have market power. Moreover, according to the affidavits and exhibits submitted by these companies, they could not hereafter obtain significant market share in competition with the many large companies already in the market,[12] and they would be unable in practice to raise their competitors' costs (through either higher tariffs or degraded access to the local exchange). Even if they could achieve such ends, the Regional Companies argue, they might at most be able to raise prices in the local exchange market, but not in the information services market—the critical area for antitrust analysis according to the Court of Appeals.

The most detailed evidence adduced by the Regional Companies on market power is an affidavit of Franklin Fisher, a professor of economics at the Massachusetts Institute of Technology.[13] According to Professor Fisher, the Regional Companies would be able to achieve market power only if (1) they had the ability to raise the costs of their rivals; (2) this ability gave them power over the price of information services; (3) regulators were unable to defeat this anticompetitive behavior; and (4) efficiency losses due to anticompetitive conduct by the Regional Companies outweighed the benefits to the public of the Regional Companies' presence in the market.[14] In this Part of this Opinion, the Court will ex-

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[12] *See, e.g.*, Hausman Affidavit at para. 12 (Exhibit to Regional Companies Motion).

[13] Professor Fisher has a Ph.D. in economics from Harvard University; he has written extensively on the economics of antitrust law and regulation; and among his other achievements are the presidency of the Econometric Society and the receipt of a John Simon Guggenheim fellowship.

[14] Fisher Affidavit at para. 6 (Exhibit 3 to Regional Companies Reply).

amine only the first and second factors described by Professor Fisher, the third and fourth factors are discussed in Parts III and VI, respectively.

Professor Fisher asserts in amplification of his conclusions that the information services market is national in scope, and that this fact permits independent information services providers to move their operations to the territory of a Regional Company that does not discriminate against them.[15] Moreover, according to the Fisher affidavit, the Regional Companies will not be able to discriminate at the consumer end of the telephone circuits because of the difficulty of acting selectively there, and the only way they could have power over price would be through collusion among all of them, which would be difficult to achieve inasmuch as seven different companies are involved.[16] Professor Jerry A. Hausman similarly contends that discrimination by a Regional Company would be inconsistent with market data and economic theory, in substantial part because the Regional Companies will compete against each other.[17]

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[15] *Id.* at para. 13, 14.

[16] *Id.* at para. 16, 26. Professor Fisher does not consider, however, that the existence of the joint research and development conducted by Bellcore on behalf of all the Regional Companies, in areas ranging from network architecture design to financial management, would greatly facilitate collusion. *See, e.g.*, Affidavit of Stanford University Professor Roger Noll at para. 53.

[17] Hausman Affidavit at para. 16 (Exhibit 2 to Regional Companies Reply). Professor Hausman dismisses concerns about denials and delays in service, poor quality service, and delays in necessary repairs as "a familiar litany." *Id.* at para 22. If Hausman is suggesting that, because these concerns are familiar they have no basis in reality, his reaction is like that of the French police inspector in the motion picture *Casablanca* who was "shocked—*shocked*" when he was told that gambling was going on in Humphrey Bogart's cafe. The litany may be familiar, but the facts behind it are nonetheless real. These facts were proved during the *AT & T* trial by many witnesses in testimony consuming many weeks. With respect to their control over the local exchange, the Regional Companies are of course now largely positioned as was AT & T before 1984.

Other evidence submitted by the Regional Companies denies the existence of incentives to engage in anticompetitive acts. Thus, Dennis Carlton and George Stigler, both professors of economics at the University of Chicago, contend that the Regional Companies do not have an incentive to discriminate against competing information services providers because, if a competitor were driven out of business, the Regional Company would lose local exchange revenues from that competitor.[18]

As concerns the Department of Justice, it submitted *no* additional affidavits or other evidence on this or any other issue in the remand proceedings,[19] with the exception of an appendix summarizing current regulations of the Federal Communications Commission. It may be regarded as odd that, on a remand for the specific purpose of the compilation of an evidentiary record, the Department produced no evidence whatever.[20]

In the briefs it has filed in the current proceeding, the Department largely contents itself with supporting the arguments made by the Regional Companies.[21] But it is

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[18] Carlton and Stigler Affidavit at para. 40 (Exhibit 4 to Regional Companies Reply). Any economic disadvantage due to the loss of exchange revenues from independent information providers would of course be more than made up through Regional Company assumption of all the business of, and the profits previously earned by, these providers.

[19] This is so even though the Court had invited all the parties to structure their submissions in the manner of summary judgment motions.

[20] The Department did make frequent reference to the report of its consultant Peter Huber which had been before this Court in the earlier triennial review decision.

[21] However, the Department does not agree with these companies with regard to the issue of the relevant market. While Professeor Hausman on behalf of the Regional Companies posits a broad information market which includes computer manufacturers, financial service companies, airlines, retailers, and the like (Hausman Affidavit at 4; Regional Companies Brief at 28-31), the Depart-

of more than academic or historical interest that, at the time of the adoption of the information services restriction, the Department postulated and persuaded the Court that the restriction was absolutely necessary, explaining as follows:

> The firms that provide information services must rely on access to local exchange facilities under the ownership and control of the [Regional Companies]. As commenters such as the American Newspaper Publishers Association and the Association of Telephone Answering Exchanges point out, *if the [Regional Companies] were permitted to offer information services they would have the power and the incentive to deter the development of competitive markets for these services.* The Department, therefore, continues to believe that the [Regional Companies] must be precluded from engaging in such activities to ensure the development of competitive markets for information services.[22]

The Department now states that it had concluded by 1987 that no substantial possibility existed that the Regional Companies could use their monopoly power in local exchange markets to impede competition in information services markets. However, that conclusion rests essentially only on the proposition that, in view of the decree's nondiscrimination provisions and of the present regulatory regime, it would be virtually impossible for a Regional Company to discriminate on a widespread basis without detection and sanction.[23] The issue of regulation

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ment states that "information services do not comprise a single market; they vary with respect to concentration, ease of entry, and dependence on local telephone facilities" (Brief for Appellant United States at 9-10 (Docket 87-5388) (filed April 17, 1989)).

[22] Response of the United States to Public Comments on Proposed Modification of Final Judgment at 65 (filed May 20, 1982) (emphasis added).

[23] Motion at 17. The Department also acknowledges that independent providers may lose profits or market share as a consequence

is discussed in Part III, *infra*. Suffice it to say at this point that regulation was also present, albeit in a somewhat different form, when the Department unambiguously and vigorously called for a prohibition on Regional Company participation in the information services market.

Regarding that aspect of its explanation which relies on the non-discrimination provisions of the decree, the Department notes that the degradation of calls to and from competing information service providers would be improper [24] under those provisions (as well as being difficult). The Department does not explain on what basis it may be assumed that, following the removal of the specific restriction on information services, the Court could reasonably convert the general antidiscrimination provisions of the decree into effective authority for restraining Regional Company anticompetitive action against independents with respect to information services, particularly since, on its face, those provisions prohibit only discrimination in favor of AT & T.[25]

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of the Regional Companies' entry into the market, but it assumes that this would occur as a result of Regional Company "efficiency or innovation," Reply Brief at 27. Of course no one can know at this time whether the Regional Companies will be efficient and innovative in information services. The Department does not acknowledge that there exists at least the possibility that the companies will gain profits or market share as a result of other factors, *i.e.*, anticompetitive activities.

[24] Motion at 17, 19-21.

[25] Section II(B) of the decree, reprinted at 552 F.Supp. at 227, states:

> B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:
>
> 1. procurement of products and services;
>
> 2. establishment and dissemination of technical information and procurement and interconnection standards;

B. Market Power as a Consequence of Bottleneck Control

Market power is often the consequence of sheer size or financial strength; but as the intervenors [26] point out, in the instance of the Regional Companies, their market power stems not from either of these factors [27] but from their still almost complete domination over the "last mile" of the telephone network, *i.e.*, their monopoly of the local wires and switches without which few, if any, competitors can reach the ultimate consumers of telephone-based information services. In fact, around ninety-nine percent of the traffic to the ultimate subscriber must still pass, in the end, through the Regional Companies' local loops.[28]

This basic circumstance [29] gives these companies the ability to exercise market power [30] with respect to the in-

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3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

[26] In order to avoid unnecessary complication, the Court will refer to the opponents of the point of view advocated by the Regional Companies as the intervenors, although several of the intervenors favor that point of view.

[27] However, these factors may likewise be present here.

[28] Transcript of April 19, 1991 hearing at 41; *see also,* Affidavit of Robert Hall at 16 (Exhibit 1 to MCI Opposition); and 673 F.Supp. at 536-40.

[29] It has long been established that essential facilities, that is, facilities which cannot feasibly be duplicated but which are critical to competitors, are a type of entry barrier. Whoever controls such an essential facility has the power to exclude competition, and such control indicates market or monopoly power. *See Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973); *United States v. Terminal R. Ass'n,* 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 992-93 (D.C.Cir.1977).

[30] For the reasons discussed in the body of this Part of the Opinion, the Court finds as a fact that the *ability* to exercise market

formation services markets, that is, to raise price, to restrict output, or both. The Regional Companies would be able to raise prices by increasing their competitors' costs, and they could raise such costs by virtue of the dependence of their rivals' information services on local network access. As Professor Hall states, "[w]hen all but one firm in a market have higher costs, the inevitable result is a higher price, lower output, and lower consumer welfare." [31] Similarly, a Regional Company would be capable of discouraging entry by acquiring a reputation for strategic predatory pricing and denying its competitors post-entry profits,[32] and it would be able to do so credibly because it could shift the costs of its information services to its regulated operations.[33]

The Court is further of the view that, if relieved of the restriction, the Regional Companies would carry out these strategies because (1) this was the pattern of their operations when they were a part of the Bell System, and (2) even after the break-up of that System, they have been engaging in these practices to the extent that they have been permitted into markets that offered opportunities therefor. *See* Part IV, *infra*.

The evidence [34] also demonstrates that non-telephone-based services are not substitutes for the information

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power is fully present. The *incentive* to exercise such power may be deduced from the expectation of increased profits and the acquisition by Regional Company managers of the ability to direct increasingly diversified, increasingly powerful conglomerates. In fact, since they were established, the companies have made many efforts to enter markets in which their bottleneck monopolies give them an advantage over possible competitors. *See* Part IV, *infra*.

[31] Hall Affidavit at 28 (Exhibit 1 to MCI Opposition).

[32] *See, e.g.*, R. Posner, *Antitrust Law* 186 (1976).

[33] Hall Affidavit at 4-5.

[34] Affidavit of Walter Sinback at pp. 5-12 (Exhibit to Opposition of General Electric Communications & Services).

transmitted over the telephone network, if only because the basic telecommunications network has distinct properties not available through other means: only the telecommunications network can offer two-way interaction with up-to-the-minute information databases accessible by a large customer base, including occasional users.[35] Clearly, telephone-based information services constitute a market that is separate from services delivered by other means.[36]

What is notable in the papers submitted on this issue by the Regional Companies is what is not discussed or discussed only to a limited extent. In view of the centrality of the intervenors' argument that the Regional Companies have market power because of their control of the bottlenecks,[37] it might have been expected that the proponents of a removal of the information services restriction would first acknowledge the contention regarding that aspect of market power, and then attempt in some substantial way, by affidavits and otherwise, to answer it. Although half-hearted attempts are made to counter the intervenors' bottleneck point, recognition of the importance of the bottleneck issue is missing and so is a fully-developed, persuasive response.

The Regional Companies do assert that "[e]xperience since divestiture, both at home and abroad, has demonstrated that control over the local telephone exchange is

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[35] *See also*, Report of Peter Huber, submitted by the Department of Justice during the triennial review proceedings, at 6.23.

[36] Another factor not present in the standard market analysis proffered by the Regional Companies is that the companies are seeking to enter the competitive information services market while they also retain their regulated local telephone operations—operations that can easily be used as cash cows from which they can milk money and then lower their own information services prices to deny profits to their competitors. The issues surrounding that circumstance are discussed in Part V, *infra*.

[37] *See* note 29, *supra*.

not a means to acquire market power in information services." [38] But there has of course been no experience with information services, for the Regional Companies have been forbidden since their birth to engage in such services (except for the limited purpose of transmitting information generated by others). *See United States v. Western Electric Co.*, 714 F.Supp. 1, 5-7 (D.D.C. 1988).

The Court permitted the Regional Companies to establish elaborate facilities and processes for the transmission of information generated by others precisely because it concluded that the "potential for anti-competitive behavior by the Regional Companies with respect to transmission only is very much limited, if only because, in the absence of their participation in the generation or manipulation of content, these companies have little incentive for discrimination against competitors in the information market." 714 F.Supp. at 5.

The Regional Companies attempt to bolster their "experience" argument by asserting that if their bottleneck control were sufficient to produce market power, the result would have evidenced itself in the CPE (customer premises equipment) market and in the experience of the GTE Corporation.[39] However, as discussed at pp. 321-22, *infra*, neither the CPE experience nor that of GTE is relevant; they prove only that, where the ability or the incentive to discriminate is lacking, discrimination will not be practiced.

Beyond that, the Regional Companies assert that practical substitutes exist for their local lines and switches (a contention with which even the Justice Department disagrees, *see* note 45, infra). At the same time, the companies provide no response to the intervenors' contention that their bottlenecks enable them to discriminate

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[38] Motion at 21.

[39] Motion at 21; Reply Brief at 74.

with respect to features necessary for the transmission of information services (*see* Part IV, *infra*).

The Department of Justice concedes that "[i]f an information service is accessible to customers through the public telephone network, information service providers will depend to some extent on the BOC's local exchange facilities and services." [40] But the Department goes on to contend that this factor does not constitute an adequate basis for the maintenance of the restriction because this Court allegedly found that a discrimination strategy would be so risky that a Regional Company would not discriminate.[41] That reliance is surprising for, as the Department knows, the Court made the finding referred to in the context of Regional Company entry into miscellaneous *non-telecommunications* businesses.[42] These are of course markets with wholly different contours in which, as distinguished from the information services market, the Regional Company local monopoly could play only a minor role.

The Department of Justice and the Regional Companies next engage in a lengthy and passionate defense of vertical integration, suggesting that the restriction [43] herein is based on a pervasive hostility to vertical integration.[44]

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[40] Justice Department Motion at 15. The Department of Justice differs from the Regional Companies on that issue, too, for unlike the companies, it concedes that various information services markets differ with respect to ease of entry, and that the independent information services providers could not, in practice, operate their own substitutes for the Regional Company bottlenecks.

[41] Reply Brief at 33-35.

[42] 673 F.Supp. at 599.

[43] Although the arguments are couched in terms of the restriction on information services, their logical effect reaches the other decree restrictions as well.

[44] Justice Department Reply Brief at 15-16, 27-28; Kahn Affidavit at 17-20; Carlton and Stigler Affidavit at 10-14 (Exhibits 1 and 4 to the Regional Companies Reply Brief).

None of the Court's positions, either now or in the past, denigrated vertical integration, nor has the Department of Justice—the author of the restriction—demonstrated hostility to that concept.

During the trial of the antitrust action against it, AT & T argued, just as the Regional Companies do here and now, that the antitrust effort constituted an attack on vertical integration. It was AT & T's announced expectation that, as a challenge to vertical integration, the antitrust action would be dismissed. However, the Department of Justice explained in response that a fundamental difference exists between vertical integration may be both useful economically and protected by the law, on the one hand, and a combination in one enterprise of a rate-of-return monopoly and various competitive ventures, on the other. The Court fully endorsed that position. *United States v. American Tel. & Tel. Co.*, 524 F.Supp. 1336, 1373-74 (D.D.C.1981). The resuscitation of the argument ten years later by AT & T's heirs does not enhance its persuasiveness.

Finally, in answer to the intervenors' bottleneck argument, the Department recites such generalities as that independent information service providers might not even be connected to the local loops controlled by the Regional Companies—a point in effect refuted by the Department's own concessions elsewhere [45]—and that it is "aware of no evidence that the [Regional Companies] would act in concert in the provision of information services. . . ." [46] The Department fails to explain how there

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[45] The Department of Justice has conceded that the available alternatives to the Regional Company exchange facilities are not "close substitutes" for local exchange services for many providers, and that it therefore could not "conclude at this point that alternative transmission media would in themselves effectively constrain [Regional Company] discrimination against most information service providers." Motion at 32-33.

[46] Motion at 29.

could be such evidence at a time when the Regional Companies are prohibited from providing information services and have presumably complied with that prohibition.

On the basis of the considerations summarized above, the Court has no hesitancy in concluding that legal and economic theory which neglects, or accords little weight to, the bottleneck factor, is entirely unrealistic. The Court further holds, on the basis of the evidence before it that, by virtue of their indispensable and ubiquitous local wires and switches, the Regional Companies possess market power in the information services market.[47]

III

Efficacy of Regulations

A. General

Both the Regional Companies and the Department of Justice contend that regulation is a significant constraint on the ability of these companies to raise their information service rivals' costs and decrease output in the information services market. The basic undergirding for that argument is that the FCC's *Computer II* rules and *Computer III* Open Network Architecture (ONA) "require the BOCs to provide their information services competitors access to BOC exchange services at the same rates the BOCs' own information services pay."[48] That argument overlooks, however, that in the days prior to its break-up, the Bell System was under a comparable obligation by virtue of the then existing FCC regulations, but

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[47] Of course, unless and until they are allowed fully into the information services market, the companies as a general matter lack the incentive to exercise such power because they do not benefit from decreased profits for other information services providers nor can they achieve monopoly profits for their own information services. *See also,* note 30, *supra.*

[48] Department of Justice Reply at 36; *see also,* Regional Companies Reply at 53-56.

that these regulations were entirely incapable of halting anticompetitive activity.[49]

As the Court found when, as an alternative to the structural relief ultimately adopted, an injunction comparable to a regulatory regime was being considered:

> It would be difficult to formulate an order that would effectively deal with all of the different kinds of anticompetitive behavior that are claimed to have occurred over a considerable period of time, in various geographical areas, and with respect to many subjects. There is evidence which suggests that AT & T's pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development. . . .
>
> An even more formidable obstacle is presented by the question of enforcement. Two former chiefs of the FCC's Common Carrier Bureau, the agency charged with regulating AT & T, testified that the Commission is not and never has been capable of effective enforcement of the laws governing AT &T's behavior. In their view, this inability was due to structural, budgetary, and financial deficiencies within the FCC as well as to the difficulty in obtain-

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[49] *See* Noll Affidavit at para. 37 (Exhibit to American Newspaper Publishers Association Opposition). The Court rejects as completely in error the conclusion of Professeor Alfred Kahn, one of the Regional Companies' economists, who minimizes the possibility of "regulatory capture," arguing that this notion is a mere "caricature" of the regulatory reality. Affidavit at 3 (Exhibit 1 to Regional Companies Reply). He states that "during the 1960s and 70s, the public utility regulatory commissions showed themselves . . . excessively disposed . . . to protect competitors from unfair disadvantage . . . ." *Id.* at 12. Having heard evidence at the eleven-month trial in this case, the Court finds that, at least in the telecommunications field, there is no basis whatever for Professor Kahn's conclusion.

> ing information from AT & T. Whatever the true cause, it seems clear that the problems of supervision by a relatively poorly-financed, poorly-staffed government agency over a gigantic corporation with almost unlimited resources in funds and gifted personnel are no more likely to be overcome in the future than they were in the past.

552 F.Supp. at 167-68 (footnotes omitted).

B. New Regulations

The suggestion is made in response that the present regulations under present conditions, involving seven corporations rather than one, will be more successful than was the pre-1984 regulatory regime. Although the current regulations include a number of new features, on balance they are, if anything, less likely to be effective than those that were supposed to constrain the Bell System. For what cannot be overemphasized is that, as the structure of a corporation becomes more complex and as it deals in more and more different products and services, it becomes increasingly difficult for regulation and regulators to oversee its operations and restrain anticompetitive efforts.[50]

The Regional Companies engage in a great many more non-telephone activities than did AT & T at any time in its existence. At least since the entry of the first consent decree in 1956 and until the resolution of the lawsuit underlying this proceeding in 1984, the Bell System was restricted to the provision of telephone service (through its Long Lines department and the local operating companies), the manufacture of telephone equipment (through Western Electric), and research (through Bell Laboratories). The Regional Companies, by contrast, are already engaged in activities too numerous to list or

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[50] *See* Affidavit of Glen Robinson, former FCC Commissioner, at 10-11 (Exhibit to Opposition of American Newspaper Publishers Association).

describe—from cellular phone service in the Soviet Union [51] to cable television in other countries, the making of loans to other corporations, the sale of software to banks and hospitals, and the conduct of market research,[52] to name but a few. In fact, there appear to be no other utilities under regulation in the United States with anywhere near as many different facets and active business interests as the seven Regional Companies.

Because of the diversification of the companies—a characteristic that would be vastly amplified by a grant of their current request—regulation has become increasingly problematic, to the point where one state regulatory body has felt compelled to explore a new structural solution—the divestiture of NYNEX's local exchange operations from its competitive enterprises. *New York Times*, October 4, 1990 at A1, col. 5; *Wall Street Journal*, October 4, 1990 at A5, col. 1. In view of the broad plans and ambitions of the various Regional Companies, these complications would be bound to multiply and so would be the obstacles to effective regulation.

Open Network Architecture is supposed to unbundle the various features available over telephone lines, in theory providing independent information service providers with more complete information about network features and allowing them to pick and choose the specific features they need. The proposed *Computer III* rules also call for new regulations on cost accounting designed to render it more difficult for Regional Companies to subsidize their information services with revenue from their

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[51] 11 *Communications Daily* No. 137, p. 4 (July 17, 1987).

[52] Force, "U S West Scales Back Leasing; Finance Subsidiary Plots Course as Merchant Bank," *American Banker* 6 (November 15, 1988); Layne, "Nynex Builds Software Role With Agreement to Buy SSI," *American Banker* 3 (July 20, 1990); "Bell Atlantic To Acquire Simborg Systems," *Modern Healthcare* 19 (June 25, 1990); Powers, "Nynex Nabs Presence in U.S. High-tech Research," *Network World* 9 (April 18, 1988).

local exchange monopoly. *See* 3 FCC Record 1150 (1988); 2 FCC Record 1298 (1987).

However, one immediate problem with these rules is that they have little or no track record from which a court could reach a conclusion as to their efficacy. The Court of Appeals for the Ninth Circuit vacated the *Computer III* rules last year, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), an action that had the effect of also vacating the ONA regime. The FCC did reinstate ONA in December of 1990, 1990 FCC LEXIS 6662, and last month it established a tariff structure.[53] However, the Regional Companies are not required to file new tariffs for these services until November 1991.[54] In short, ONA is still developing and evolving, and its success in enabling competitors in the information services market to obtain the features they need is entirely unproven. Thus, with respect to regulation, the situation is not significantly different from what it was last year when the Court of Appeals concluded that any assessment of the new FCC regulatory regime was too speculative. 900 F.2d at 298.[55]

C. Inherent Problems

Beyond the naturally still isolated examples of anti-competitive conduct discussed below, there is the overriding fact, which experience has validated again and again, that as a practical matter it appears to be impossible for regulators to devise simple rules to govern the many economic, technical, and financial circumstances

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[53] 11 *Communications Daily* No. 115, p. 3 (June 14, 1991).

[54] *Id.*

[55] As for those ONA rules that have been in place over the last several years, they have already provided some indication of their lack of effectiveness: they have not prevented the Regional Companies from discriminating against their competitors in the few markets in which such discrimination was at all feasible. *See* Part IV, *infra.*

affecting behavior in an area that is characterized by technological change perhaps more than by any other factor.

Yet unless the rules are quite simple and straightforward, the Regional Companies will be able to contend, again and again, that any particular rule is not applicable to whatever anticompetitive practices they may be engaged in, and to tie up enforcement almost indefinitely in administrative proceedings and in litigation. This is not a mere theoretical concern. The evidence at the *AT & T* trial proved that it is possible to engage in endless dilatory maneuvers to preserve freedom of anticompetitive action even when the rules are relatively straightforward. And the voluminous files of this Court bear mute witness to the propensity of the Regional Companies to repeat claims and defenses, many of them frivolous, based on asserted distinctions from settled rulings.

As Professor Roger Noll of Stanford [56] points out in his affidavit (at pp. 32-33):

> Information services provide an especially poor candidate for BOC entry because of the complexity and diversity of the industry. Almost every supplier is likely to try to produce a unique information product —just as word processors, statistical packages, data base services, reference services, and home shopping services are all somewhat different. This diversity, driven by differences among consumers in the kinds of services they most desire, makes discriminatory practices, strategic cost accounting among services, and unwarranted self-dealing financially attractive to a BOC, but especially difficult to prevent, or even to

[56] Among his other achievements, Professor Noll is currently supervisory editor of *Information Economics and Policy*, the journal of the International Telecommunications Society, he participated in the President's Task Force on Telecommunications Policy, and he consulted for the Department of Justice by way of developing market definitions for use in the *AT & T* case, and for the Federal Communications Commission as a special adviser to the chairman.

> detect. To the extent local telephone companies have *any* discretion in selecting cost allocation methods, in varying service quality among information service providers, or in biasing the technology of local networks in favor of their own information services, they are certain to do so for two reasons. One is the absolute certainty that some such strategies will succeed. The other is that such strategies, even if detected, will provide an interim period of excess profits because they impose handicaps on rivals and raise entry costs in the form of litigation to induce regulators and courts to overturn the offending practices.

The Court is convinced by the Noll analysis; indeed, it regards conclusions based on the facts which underlie that analysis as well-nigh irrefutable.

Experience has amply shown that regulatory enforcement proceedings often take years to complete and that, even then, the decisions that emerge are by and large only prospective in application. For example, a tariff becomes effective immediately upon its filing by a Regional Company, and absent unusual circumstances and special action, it remains in that status until all FCC proceedings have been completed (and possibly court reviews as well).[57] It was for that reason, among others, that the Department of Justice in 1982 sought structural relief in its proposed consent decree. While the Court is reluctant

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[57] The Regional Companies are almost never penalized for engaging in anticompetitive behavior even if ultimately they lose before the regulators. *See* Affidavit of Nina Cornell at 30 (Exhibit 2 to MCI Opposition). In voice messaging, for example, BellSouth delayed making available to its competitors a special feature until it was ready to compete in the market. *Id.* at 14-15. BellSouth also provided a call forwarding feature to its competitors under a tariff which raised these competitors' costs by as much as 900%. Cornell Affidavit at 12. The company withdrew the tariff from operation in Florida, but that same tariff is still in effect in other states. *Id.* at 12.

to cite to the AT & T experience (*see* Part VII-C, *infra*), it cannot help but observe that with respect to the efficacy of regulations to rein in a determined telecommunications monopolist, the situation is today essentially what it was before the divestiture, and that, to the limited extent that there has been any change, it has been, on balance, toward a diminution in the effectiveness of regulation.[58]

D. Justice Department Contentions

In an area where the pre-divestiture record unambiguously proves that regulation could not restrain the monopolists' anticompetitive activities, and where no substantial record has been developed since that time, the Department of Justice advances a group of contentions that singularly lack merit. The Department contends, first, that there is no basis for concluding that the Regional Companies will not, for the most part, conform their activities to the FCC's rules (Reply Brief at 37-38); second, that the FCC has received no complaints with respect to the information services authorized by the March 1988 decree modification (Reply Brief at 38); and third, that while the FCC received other complaints regarding Regional Company anticompetitive conduct, they should be ignored for a variety of reasons (Reply Brief at 43).

As concerns the first and second points, they have no substance because the only activities in which the Regional Companies were allowed to engage since they became in-

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[58] To be sure, unlike its most recent predecessors, the current Federal Communications Commission does not appear to be viscerally opposed to the very regulation it is charged with administering. However, the problems with regulation in the telecommunications market are primarily the systemic ones described above; they do not depend, except at the margin, on the abilities and good intentions of the regulators. In the 1960s and 1970s, the FCC appears to have been committed to making regulation work, but as the *AT & T* trial record shows, the Commission was incapable of neutralizing the Bell System's anticompetitive activities.

dependent entities in 1984 were of the type with respect to which this Court had expressly concluded that they would provide no realistic opportunity for anticompetitive conduct.[59]

Primarily relied upon by the Department is the Regional Company experience with CPE.[60] But that product does not present a valid analogy in the present context because the Regional Companies are only allowed to sell CPE, not to manufacture it. It was precisely because the manufacture of the product would have given them the ability to engage in anticompetitive activities, while the sale of CPE manufactured by others would not, that the Court eliminated from the proposed consent decree the prohibition on the latter but not on the former. As the Court said at the time:

> The proposed decree would also prohibit the Operating Companies from selling or leasing customer premises equipment. . . .
>
> Anticompetitive activities undertaken by two separate corporations rather than by two components of the same corporation are likely to be far more difficult to accomplish because of increased problems of coordination and the greater possibility of detection. For example, it would be quite difficult for an Operating Company to conspire successfully with a man-

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[59] If the Department's belief in the Regional Companies' good intentions is intended to extend also to the record of the companies when they were still a part of the Bell System, it is of course contradicted by almost every paper the Department filed in the *AT & T* case.

[60] The affidavit of Professor Franklin Fisher cites, in addition to CPE, experience with the Yellow Pages, voice messaging, videotex, pay phones, cellular phones, and PBX, contending that in none of these have the Regional Companies attained market power. The reasons cited above for concluding that the Regional Companies lack the ability to engage in anticompetitive activities with respect to CPE apply to these other products and services as well.

> ufacturer to provide advance information about revised network standards or to impose interconnection restrictions which favored that manufacturer's products and no one else's.

552 F.Supp. at 191 (footnotes omitted).

As indicated, the Regional Companies also refer to the experience of GTE which, it is said, has not discriminated in spite of the fact that it is not bound by line of business restrictions.[61] However, when the Court, at the request of the Department of Justice, permitted GTE to engage in interexchange and information services, it did so on the basis that the company would not have the ability to engage in anticompetitive actions with regard to these services, largely because of its dispersed geographical base. *United States v. GTE Corp.*, 603 F.Supp. 730, 734 (D.D.C. 1984).

In the Court's view, no valid conclusion can be drawn from Regional Company non-discrimination in a market that provides no opportunity for discrimination. To put it another way, it is difficult to understand by what process of reasoning a finding of future lawful conduct with respect to activities providing ample opportunities for discrimination can be drawn from past experience with respect to activities which offer no such opportunities.

As for the Department's third argument, it, too, is specious. Essentially the Department states that when the FCC finds complaints of improper Regional Company activity to be well taken and acts upon them, this is proof that regulation is effective; when the FCC rejects particular complaints, this demonstrates that the complaints have no merit; and when the complaints are still pending administratively, it should be assumed that they will be resolved appropriately.[62] However, the regulations cannot

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[61] Regional Companies Reply at 37-38.

[62] Reply Brief at 43.

be pronounced effective merely because the FCC dealt, somehow, with a minute number of complaints, nor does rejection of complaints prove their lack of worth or their pendency support the assumption that, some day, they will be properly resolved. The sad history of regulation in this field proves at least that much.

More fundamentally, had the Department suggested so circular an approach around 1980, it would have been unnecessary to hold the *AT & T* trial, for whatever the evidence, the Bell System would have prevailed on that kind of rationale. But the Department did not make that argument then—indeed, it would have greeted such an argument, if made by AT & T, with scorn and ridicule—and the Court will not credit that argument now.

Finally, both the Department and the Regional Companies contend that, in any event, should regulation fail, the antitrust laws themselves would provide a significant deterrent to Regional Company anticompetitive conduct.[63] The Court does not consider it a valid basis for dissolving a significant part of a prophylactic antitrust decree that a new antitrust suit could some day be brought, presumably to result after years of litigation in a new decree, which would then again be dissolved upon hopes or professions of good behavior, and so on *ad infinitum*.

E. State Regulation.

State regulation is also likely to be ineffective in the current context. State regulators, who in the main must perforce operate with meager resources, but who are nevertheless responsible for the regulation of the bulk of Regional Company services, have consistently been unable, despite the best efforts of some, to exercise control over the vast and powerful Regional Companies. One

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[63] Department Reply Brief at 43-44; Regional Companies Reply Brief at 61-62.

basic reason for this impotence, in addition to the paucity of resources, is the fact that each of the Regional Companies operates in several states, and all of them are thus effectively beyond the jurisdiction of any single local regulatory body. Indeed, some of these companies, *e.g.*, US West, have refused to turn over to state regulators their records pertaining to operations within the region but outside of the particular state. *See* 673 F.Supp. at 569 n. 198. Beyond that, if federal regulators are not able to prevent anticompetitive conduct by the financially mighty and politically influential Regional Companies—in many areas the most powerful private entities extant—one would have to be an incurable optimist to suppose that state regulators could do so.

For these reasons, it is the finding of the Court, based on the evidence before it, that neither FCC nor state regulation can be expected to prevent anticompetitive activities by the Regional Companies.

IV

Anticompetitive Conduct by Regional Companies

Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct, albeit necessarily on a limited scale.

The affidavits submitted by some of the intervenors report that in the voice messaging market the Regional Companies have designed technical features in such a way as to render them incompatible with competitors' standard equipment; [64] priced the features in such a man-

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[64] Affidavit of Nina Cornell at 10; Affidavit of Richard Press at 2-3; Affidavit of Frank Brooks at 6-7 (Exhibits 2, 9, and 6 to MCI Opposition).

ner as to raise their rivals' costs;[65] made important and necessary features available only to their own affiliates;[66] and delayed implementation of features requested by competitors until the particular Regional Company was ready to enter the market.[67] At least two Regional Companies charge more to the customers of their competitors for needed features than they charge their own customers,[68] and this, too, has had the effect of raising these competitors' costs. To add insult to injury, some Regional Companies use as a selling point with customers the unavailability of the features they are withholding from competitors.[69]

Significantly, some of this anticompetitive conduct is made possible by the Regional Companies' requirement that, to receive service, independent information providers must submit detailed technical and marketing information to Regional Company personnel who can then use these data to decide whether and when their company will provide competing services.[70]

Similarly, in the payphone market, the lines the Regional Companies provide to their competitors are in-

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[65] Cornell Affidavit at 11-12; Hall Affidavit at 31-32 (Exhibit 1 to MCI Opposition); Brooks Affidavit at 3, 6. As indicated above, note 57, in one state, access tariffs were raised by over nine hundred percent.

[66] Cornell Affidavit at 7-8; Affidavit of Rubie Czerwinski at 1-4 (Exhibit 7 to MCI Opposition); Brooks Affidavit at 2-3, 5, 7.

[67] Cornell Affidavit at 7-8. Ms. Cornell identifies the "Call Forwarding Busy Line" and "Call Forwarding Don't Answer" features as among those that the Regional Companies had the technology to implement in 1985, but failed to implement until 1988, when they were first allowed in the voice messaging market. *See* Brooks Affidavit at 2-3; Czerwinski Affidavit at 2-3; Affidavit of Michael Hydock at 2-4 (Exhibit 4 to MCI Opposition).

[68] Czerwinski Affidavit at 3-4; Press Affidavit at 1.

[69] Brooks Affidavit at 8.

[70] Cornell Affidavit at 33-34; Hall Affidavit at 42-43.

ferior in critical respects to the lines they use themselves.[71] In the audiotex market, independent providers report that the Regional Companies are delaying the servicing of their lines and are rendering the servicing and billing as inconvenient for them as possible; [72] and, just as the Bell System denied FX (foreign exchange) and CCSA (common control switching arrangement) connections to MCI,[73] Regional Companies are now denying to their competitors interconnections comparable to those that the Regional Companies themselves enjoy.[74]

In response, the Regional Companies explain that complaints about the alleged anticompetitive actions in the voice messaging market were either not specific enough to be investigated [75] or were resolved through regulatory commissions.[76] The Regional Companies further claim that they now provide enhanced features on an equal basis pursuant to tariffed rates,[77] and that they have ceased the anticompetitive activity.[78] The companies also describe the anticompetitive actions in the audiotex market as isolated incidents of customer service problems, and they

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[71] Cornell Affidavit at 17.

[72] Affidavit of Dale Larson at 8-10 (conduct of U S West); Affidavit of Karen Stabley at 5-6 (conduct of Bell Atlantic) (Exhibits to American Newspaper Publishers Association Opposition).

[73] This was an important item of proof in the *AT & T* trial. 524 F.Supp. at 1355.

[74] Cornell Affidavit at 22.

[75] *See* Exhibit No. 13 to Regional Companies Reply Affidavit Response No. 31.

[76] *Id.* at Response No. 27.

[77] *Id.* at Response No. 25, 32. As for the failure to make enhanced features available until the Regional Companies themselves were able to enter the market, the answer given is that Southwestern Bell provided these features through a special arrangement until there was enough demand to warrant the filing of a tariff.

[78] *Id.* at Response No. 24, 33.

contend that there was no intent to "inconvenience" the information service provider.[79] As for payphones, the Regional Companies explain that the problems have been settled through state regulators[80] or are currently being considered by regulators and the courts.[81]

It is surprising that the Regional Companies have succeeded in engaging in any anticompetitive conduct because until now they have been permitted to operate only in severely limited markets with respect to which such conduct appeared to be unlikely. But certainly the incidents that have thus far been brought to light—at a time when the Regional Companies knew full well that the Court was present and prepared to take action with respect to the still existing information services restriction—buttress the conclusion that to remove the restriction on the vast and complex information services field would be to court a significant risk of anticompetitive activities on a substantial scale, with equally substantial injury to competition.

V

Cross-Subsidization

The Regional Companies claim that they will not be able to force competitors out of the information services market through cross-subsidization and predatory pricing; that anticompetitive behavior would be detected and prosecuted by regulators; and that their potential competitors in the market are other large corporations with substantial resources which could withstand a predatory pricing strategy.[82]

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[79] *Id.* at Response No. 20.

[80] *Id.* at Response No. 44.

[81] *Id.* at Responses 45, 46.

[82] Hausman Affidavit at 6-7 (Exhibit to Regional Companies Motion); Affidavit of Sanford Grossman at 3 (Exhibit 7 to Regional Companies Reply).

There can be no question but that, due to the limited effectiveness of regulation (as discussed in Part II, *supra*), it would not be difficult for a Regional Company which is so inclined to divert ratepayer funds to its competitive enterprises, including its information services activities. The consequence of such diversion would be to enable the company to undersell its independent rivals in the information services market long and effectively enough to drive them from the market.

The Department of Justice argues, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), that such a scheme would not be successful, for the predator could not keep incurring losses for a sufficiently long period to drive out competitors and to keep them out. It is certainly true that, as the *Matsushita* Court stated, such schemes "are rarely tried, and even more rarely successful." *Id.* at 589, 106 S.Ct. at 1357. That broad rule surely applies in most situations where one enterprise seeks to eject another from a particular market by predatory pricing.

One of the prerequisites to a strategy of predatory pricing is that the predator must have the "financial staying power" to outlast its competitors. Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 *Harv.L.Rev.* 697, 698-99 (1975). But as the Department of Justice recognized in 1981, a regulated monopoly whose revenues are determined through rate of return regulation has "almost limitless staying power." Government's Opposition to Defendants' Motion to Dismiss at 206 note * (filed August 16, 1981).

Staying power is certainly present in a situation such as that involved here, where a Regional Company, engaged in both competitive and noncompetitive markets, has the ability to make up for losses in the competitive arena

indefinitely, or certainly as long as necessary. All it takes to achieve that objective is the ability to transfer funds to the information services enterprise from the noncompetive local operations accounts that are periodically replenished by the ratepayers.

Here again, the Department of Justice previously understood and championed this reasoning. *See* Government's Opposition to Defendants' Motion to Dismiss (in the *AT & T* case) at 206 (filed August 16, 1981), where the Department said that "[u]nlike an unregulated firm, which must forego current profits to engage in below cost pricing, AT & T is subject to an overall earnings ceiling. It therefore has the ability, virtually indefinitely, to subsidize the prices of its competitive services with earnings from services in which it faces little or no competition—without sacrificing current profits." If the term "AT & T" is replaced by "a Regional Company," the quotation quite snugly fits the present situation.[83]

The only obstacle to such subsidization that has been suggested is that of regulatory oversight, that is, that the state regulators will not permit the Regional Companies to engage in such activities.[84] But as discussed in Part III-E, *supra*, the barriers to effective state regulation are so fundamental and pervasive that such regulation cannot be depended upon to stand in the way of strategic entry deterrence by the Regional Companies (any more than

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[83] The FCC plan to replace overall earnings ceilings with price caps has not yet been fully implemented. Even when it is, the Department's former cross-subsidization analysis will still apply.

[84] The Department of Justice professes not to know whether cost shifting opportunities will raise or lower prices in an information services market. Department Reply Brief at 64. But it is perfectly obvious that, while such strategies will in the short run lower price—as, for example, also does "dumping" by foreign firms—in the long run they permit the extraction of much higher prices and profits following the elimination of competitors from the market.

regulation was capable to standing in the way of similar activities by the Bell System).[85]

VI

Consequences of a Removal of the Restriction

A. Decrease in Competition

According to the Regional Companies and the Department of Justice, far from revealing that removal of the information services restriction would be likely to lesssen competition, the record demonstrates that such removal would increase competition in the relevant markets. The claim is that upon removal of the restriction, the Regional Companies would be able to provide new and better services, including additional features in gateways, information content, and other features of benefit to a variety of businesses.[86] Further, it is said, such removal would provide an increased incentive for Regional Company innovation in network services that would benefit not only these companies but also non-Regional Company information providers. And in a similar vein it is contended that the availability and technological sophistication of information services for small businesses and residential customers—which allegedly are lagging behind those of other countries—would vastly improve if the Regional Companies were permitted into the market.[87]

Under the Court of Appeals mandate, some of these considerations may be regarded as irrelevant, because "the 'public interest' test must take its meaning [only]

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[85] *See* Hall Affidavit at 4-5, 9-10.

[86] Regional Companies Reply Brief at 31; Hausman Reply Affidavit at 27-28. Additionally, it is claimed that losses due to anticompetitive behavior by the Regional Companies will be outweighed by the benefits to the public from the Regional Companies' presence in the market. Fisher Affidavit at 6, 19-20.

[87] Department of Justice Reply Brief at 21-25.

from the antitrust laws." 900 F.2d at 308. However, to the extent that it is not entirely clear whether the points made are properly within or without the antitrust rubric,[88] the Court has considered them and has concluded that they are in error.

In the first place, the contention that it will take the Regional Companies to provide better information services to the American public can only be described as preposterous. The Regional Companies have no experience in the content or substance of information, whether it be news, financial information, compilations of materials of various kinds, or the provision of interactive services, and neither had the Bell System when the local telephone companies still operated under its umbrella. To be sure, the Regional Companies have experience in the transmission and dissemination of information, but they have been permitted to be active in that market since the Court so ruled in 1988.

In any event, far more probable than the realization of the Regional Companies' claims is the possibility that, once they are allowed to enter the information services market, many of those who now provide such services and which currently make the market so "robust and rapidly expanding" [89] will be driven out of business by the anticompetitive strategies which, on the basis of past experience, the Regional Companies will likely adopt. As a consequence, competition in the market will suffer or be extinguished.[90]

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[88] Some factors have been determined by the Court of Appeals as being plainly without that rubric (*e.g.*, the welfare of local ratepayers) and others are clearly appropriate antitrust considerations (*e.g.*, the power to raise price). With respect to still other subjects (*e.g.*, provision of better services and other benefits to the public) the answer is not certain.

[89] Regional Companies Reply Brief at 2.

[90] After the independents have been eliminated from the market, the American consumer is likely to be faced with sharply reduced

Moreover, the Court considers the claim that the Regional Companies' entry into information services would usher in an era of sophisticated information services available to all as so much hype. Experience suggests that once these companies have achieved the removal of the information services restriction, ample reasons will be found and cited why the more expensive promises could not be fulfilled.[91]

In the opinion of this Court, informed by over twelve years of experience with evidence in the telecommunica-

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choices in information services: the Regional Companies will have no incentive to inaugurate new or innovative services (just as their predecessor AT & T had no incentive to provide and was slow in providing new services and products when it had monopoly control over the local exchanges and was thereby enabled to keep out competitors in long distance and manufacturing). This problem will in the present instance be exacerbated by the fact that because information services are expensive to develop and relatively cheap to disseminate, the Regional Companies will have little incentive to develop new services once competitors have been forced out of the market. Noll Affidavit at 14.

[91] Some of the Regional Companies have been quite ready since the beginning of the decree construction and waiver process to make claims that were repudiated as soon as they had served their purposes.

For example, in response to this Court's September 10, 1987 opinion on information services, the assertion was made that all the companies needed in order to facilitate the provision to the American people of the most advanced information services was a relaxation of the restriction on the transmission of such services. *See, e.g.,* Proposed Order and Explanatory Memorandum of U S West filed October 15, 1987. However, immediately upon the achievement of that goal, a drumbeat of arguments was heard that there was also an absolute necessity for the companies' entry into information content. The claim was made and endlessly repeated that, unless they were also permitted to generate information, they had not received all that was their due, and the American public was being shortchanged with respect to information services. The prediction made now that the entry of the Regional Companies into information services will yield vast benefits to the American public must be evaluated in the light of that experience and others of a similar nature.

tions field, the most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of the American people in just a few dominant, collaborative [92] conglomerates, with the captive local telephone monopolies as their base. Such a development would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic wellbeing of the American people.

B. Comparison With Foreign Information Systems

The Regional Companies also complain that the information services restriction has resulted in the United States falling behind other countries in the provision of information services. In this regard they point particularly to the French Minitel system with its inexpensive monitors in several million homes and businesses [93] as pointing to the path that should be followed here. However, the fact is that in France the state-owned company which transmits the information does not also generate it; its sole function is transmission. The French system should thus be seen as a videotex gateway system paralleling the system the Regional Companies have been permitted to provide since 1988; it is not an enterprise that generates the information that it transmits.

If the Regional Companies were permitted both to generate information and to transmit it, they would, certainly as of now, appear to be the only entities in the developed world to have this kind of a stranglehold on information.

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[92] Bellcore, the joint Regional Company research arm, will be a ready vehicle for achieving joint control of the information services market.

[93] *See* Hausman Affidavit at 97-98 (Exhibit to Regional Companies Motion). The monitors were furnished to consumers free of charge by the government-owned telephone company.

The present era is increasingly being described, with considerable accuracy, as an Information Age, with information more and more a central feature of the economy.[94] That being the case, it would hardly make sense or be in the public interest to cancel an important part of an antitrust decree forged after several decades of on-and-off litigation, and turn a key ingredient of the emerging information society over to corporations who not so long ago were involved in major violations of the antitrust laws, and who even now seem ready to engage in anticompetitive practices whenever the opportunity therefor presents itself. Indeed, it would be difficult to conceive of a step that would be less in the public interest.

VII

Ruling in Accordance With Appellate Mandate

For the reasons stated in Parts I through VI above, were the Court free to exercise its own judgment, it would conclude without hesitation that removal of the information services restriction is incompatible with the decree and the public interest. However, as will now be explained, the Court is not free to exercise its own judgment. Indeed, it has concluded that several rulings of the Court of Appeals in its 1990 opinion, as detailed *infra*, leave it no choice but to remove the restriction. Regardless of its own views of the law and the facts, this District Court, like all trial courts, is of course bound to follow and implement directions from appellate tribunals.[95] And the Court has concluded that, if it is to be faithful to the directions of the Court of Appeals, it must grant the

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[94] This appears also to be true of such aspects of national life, to a greater or lesser degree, as entertainment, politics, and national defense.

[95] In addition to its legal duty to follow that course, this judge is also mindful of the several district judges in various Southern states who, in the years following *Brown v. Board of Education*,

Regional Companies' motion. It will accordingly do so, albeit with considerable reluctance.

Under the appellate mandate, the "burden of proof" issues are of decisive importance. It is telling in that respect that both the Department of Justice and the Regional Companies have concentrated in their written and oral submissions to this Court upon these issues, as distinguished from substantive ones. *See, e.g.*, the Regional Companies Reply Memorandum which begins as follows: "The central issue raised in intervenors' brief is one already settled by the Court of Appeals: the standard of review. Intervenors ask this Court to second-guess the Justice Department's policy judgment that removal of the information services restriction is now in order." [96] As will be seen below, in view of the language of the appellate opinion, that assessment is not inaccurate.

The particular appellate rulings which, in the opinion of this Court, leave it no choice other than to remove the restriction, are as follows. First, rather than to leave the Court free to weigh the evidence and the law proffered by all the parties, preferring one over the other only on the basis of credibility, logic, consistency with known facts, and similar qualitative factors, the appellate decision requires the Court to accord special weight and deference to the views of the Department of Justice. Second, rather

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347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and other Supreme Court and Court of Appeals rulings on civil rights issues, stubbornly refused to follow these rulings. These were entirely inappropriate courses of action, and this judge has no desire to emulate them.

[96] Regional Companies Reply at 1. The same theme is repeated again and again. *See, e.g.*, Reply Brief at 3 ("In light of the complex, multi-factored, judgmental character of the Department's policy determination, and the impressive array of support that determination has received, no one could reasonably conclude that removal of the information services restriction is 'certain to lessen competition,' ").

than to permit the Court to make its decision on the antitrust issues by the standard of probability of outcomes, the appellate decision requires the Court to remove the information services restriction unless there is certainty that entry of the Regional Companies into the information services market will lead to anticompetitive conduct by these companies. Third, rather than to allow the Court to consider substantially the actual performance of the local telephone companies when they were still part of the Bell System, the appellate decision requires the Court to accord primary weight to the necessarily theoretical present-day forecasts of economists. Each of these factors will now be explained in somewhat more detail.

A. Deference to Department of Justice

The Court of Appeals has ruled that this Court must approve the proposed lifting of the information services restriction if the proposal satisfies the "public interest" standard of the Tunney Act. 900 F.2d at 295. Among the significant provisions of that Act is section 16(e) of title 15 of the United States Code, which directs that proposed antitrust consent decrees in government cases may not become effective unless they are approved by the court having jurisdiction of the underlying lawsuit. Indeed, it is plain from the statute and its legislative history that a court, rather than being a "rubber stamp" for the Department of Justice, is required to act as an independent check on the terms of such decrees. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 148-49 (D.D.C. 1982); *see United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

The legislative history of the statute shows that the Congress was disturbed that antitrust consent decrees had sometimes failed to provide appropriate relief, either because of miscalculations by the Department of Justice or because of the "great influence and economic power" wielded with respect to that department by antitrust

violators.[97] That history, moreover, is replete with examples of Justice Department support of companies with great economic as well as political power. Congress took particular note in this regard of the history of the ITT consent decree which was negotiated under questionable conditions,[98] and of the 1953 phase of the AT & T litigation, in which the then Attorney General settled the case under dubious circumstances on the basis of "token" measures agreed to following private discussions.[99] It was to deal with such problems that Congress directed that antitrust settlements arrived at between the Department of Justice and private corporations were not to become effective unless the court having jurisdiction over the lawsuit found them to be in the public interest.

The Court of Appeals stated in its remand opinion in this case that this Court is required to defer to the Department of Justice on the issue of whether the proposed modification of the decree is in the public interest as that term is used in the Tunney Act.[100] It is the Department which is to weigh the various considerations, the Court

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[97] *See, e.g.*, S.Rep. No. 93-298, 93rd Cong., 1st Sess. 5 (1973); 120 Cong.Rec. 36341 (1974). Senator Tunney, the Act's sponsor, likewise pointed out why for various reasons the Department of Justice could often not be relied upon to do an adequate job. 119 Cong.Rec. 24598, 3451 (1973).

[98] *See* Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 Col.L.Rev. 594, 603-06 (1973).

[99] In a meeting at the Greenbrier resort, the Attorney General told AT & T's General Counsel that he wanted to "get rid" of the antitrust case, and that AT & T should be able "readily [to] find practices that [it] might agree to have enjoined with no real injury to [its] business." Report of Antitrust Subcommittee of House Committee on the Judiciary at 53, 86th Cong., 1st Sess. January 30, 1959 (Committee Print).

See 552 F.Supp. at 136-37, including notes 8 through 14.

[100] 900 F.2d at 295.

being neither required nor permitted to determine whether the resulting array of rights and liabilities is the one that will best serve society. 900 F.2d at 309.[101] More specifically, the appellate court instructed this Court in broad terms to "seriously consider" the Department's judgment on issues "of economic analysis," on "predictions of market behavior," 900 F.2d at 297,[102] and on the effectiveness of FCC regulations, 900 F.2d at 298,[103] the basis therefor [104]

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[101] The Court of Appeals stated in this connection that District Courts were to decide only whether the settlement is within the reaches of the public interest. 900 F.2d at 309.

[102] In this respect, the Court of Appeals relied in part upon the assumption that this Court *required* the Department to report to the Court every three years concerning the need for the restriction. 900 F.2d at 297. That assumption is mistaken. The Department of Justice volunteered to provide such reports; they were never required. 552 F.Supp. at 195.

[103] Elsewhere, the Court of Appeals again emphasized that on the issue of the efficacy of the FCC regulations the Department of Justice's assessment is entitled to significant weight, and it went on to affirm various conclusions reached by this Court on the basis that the Department agreed with this Court and there was no reason to doubt the assessments made thereon by the *Department of Justice*. 900 F.2d at 309. Similarly in postponing judgment on the efficacy of FCC regulations, the Court of Appeals said that it thought it "more prudent to await *the DOJ's assessment* in subsequent Triennial Reviews." 900 F.2d at 298 (emphasis added).

[104] The Court of Appeals further relied on the conclusion that it was an "institutional anomaly" for a District Court to evaluate the effectiveness of an agency's regulatory program, but that there was no such anomaly when the Department of Justice conducts such an evaluation. 900 F.2d at 298. Courts pass on and otherwise evaluate federal agency programs in a great variety of situations; indeed a substantial proportion of the docket of the Court of Appeals consists of such cases, and they likewise appear with some frequency in the district courts, both here and elsewhere. However, such an evaluation by another Executive department in the course of litigation, particularly litigation concerning a judicial decree, is unusual.

being that the Department might be expected to be more expert than the Court in these fields.[105] 900 F.2d at 298.

In light of these appellate directions, the Regional Companies are drawing reasonable conclusions when they assert that, "unless the relief requested by the Department is plainly outside the bounds of rational policy choice, the Department's motion must be granted, whether or not the District Court believes that the Department is making a mistake;" [106] when they state that the Court of Appeals "has directed this Court simply to determine whether the Department's judgment [that removal of the information services restriction is now in order] is within 'the zone of settlements consonant with the public interest today;' " [107] and when they contend that "[i]n view of the substantial deference that is due to the Department of Jusctice in this field of economic prediction and inexact science, no amount of discovery or trial testimony would permit the Court to upset the Department's reasoned

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[105] While a party to litigation may not infrequently be more familiar with the intricacies of particular facts and law than a court, it has never been suggested that this circumstance requires a court to give deference to the conclusions reached by such a party. Even where an agency is charged with the administration of a particular statute, its interpretations and litigating positions are not entitled to judicial deference if such positions, as here, are "unsupported by regulations, rulings, or administrative practice," *Georgetown University Hospital v. Sullivan*, 934 F.2d 1280, 1283 n. 3 (D.C.Cir.1991). Here, of course, we are dealing with the interpretation of a judicial decree—not a subject under Department of Justice administration. Moreover, while that Department may have greater expertise than the courts on antitrust matters in general, this is not likely to be true of the law and the facts governing this particular case which has been under the Court's continuous jurisdiction for over a decade.

[106] Reply Brief at 13.

[107] Reply Brief at 1 (quoting 900 F.2d at 307) (emphasis omitted).

evaluation of the competitive risks and benefits of RBOC entry."[108]

It is in that context that this Court must consider the determinations of the Department of Justice with respect to the subjects on which, under the appellate decision, the Department is entitled to deference.

The Department's principal determinations on these subjects are as follows:

> The fact that competitors depend on Regional Company bottleneck facilities is not in itself sufficient to establish a risk of anticompetitive discrimination, particularly because alternatives[109] are available.[110] The risk of discrimination is minimal since adequate legal or regulatory constraints are present.[111] Any selective degradation of service or the grant of priority to the Regional Company's own information service would be difficult to implement, particularly in view of the FCC's ONA and *Computer III* regulations.[112] There is no evidence that the Regional Companies would act in concert so as to discriminate in the information services field.[113]

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[108] Reply Brief at 86-87.

[109] Motion at 19-20, 30. The Department concedes, however, that it "cannot conclude at this point that alternative transmission media would in themselves effectively constrain BOC discrimination against most information services providers." Motion at 33.

[110] Motion at 15, 30. On the other hand, the Department has concluded that the risk of anti-competitive discrimination against information service providers is not substantial, because these providers could reach their customers through various types of indirect connections—a conclusion that seems to be at odds with one noted in note 109, *supra*.

[111] Motion at 22.

[112] Motion at 22-27.

[113] Motion at 29.

> No substantial risk is present that competition would be impaired by Regional Company cross-subsidization because of FCC regulatory oversight and because few facilities and personnel will be shared between the Regional Companies' exchange operations and their information services.[114]

It is this Court's conclusion that none of these contentions is supported by credible evidence in the record, and the Court finds instead, for the reasons elaborated on in Parts I through VI above that, should the restriction on information services be removed, the Regional Companies would have the incentive and the ability, notwithstanding regulatory constraints, to engage in anticompetitive acts on a substantial scale. Nevertheless, in view of the strong and hardly routine Court of Appeals admonitions, this Court has no choice but to defer to the current conclusions [115] of the Department of Justice on these issues.

B. The Issue of Certainty

This determination is strengthened by the appellate emphasis on certainty. The Court of Appeals has ruled that the "appropriate question under section VII [of the decree] is whether the proposed modification would be *certain* to lessen competition in the relevant market," 900 F.2d at 308 (emphasis added), that is, whether Regional Company entry into the information services market would be *certain* to have the effect of raising price or restricting output in that market.

The intervenors point out that the test under traditional Supreme Court and other appellate decisions with respect

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[114] Motion at 33-35.

[115] As the Court has preivously noted, when the decree was drafted, adopted, and implemented, and for several years thereafter, the Department expressed and urged upon the Court views that were precisely the opposite of its current stance on virtually every issue. Nothing occurred at the time of the Department's change in position other than a change in personnel.

to antitrust law involves "probabilities, not certainties." [116] *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 n. 39, 82 S.Ct. 1502, 1522 n. 39, 8 L.Ed.2d 510 (1962); [117] *see United States v. General Dynamics Corp.,* 415 U.S. 486, 505, 94 S.Ct. 1186, 1198, 39 L.Ed.2d 530 (1974); *Federal Trade Commission v. Procter & Gamble Co.,* 386 U.S. 568, 577, 87 S.Ct. 1224, 1229, 18 L.Ed.2d 303 (1967); *United States v. Penn-Olin Chemical Co.,* 378 U.S. 158, 17, 84 S.Ct. 1710, 1717, 12 L.Ed.2d 775 (1964); *United States v. Aluminum Co. of America,* 377 U.S. 271, 280, 84 S.Ct. 1283, 1289, 12 L.Ed.2d 314 (1964); *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 984 (D.C.Cir.1990). Indeed, the certainty standard may well be an impossible one; as the Court of Appeals recognized, economic analysis and market predictions are not an exact science (900 F.2d at 297).[118]

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[116] In fact, the Court of Appeals itself speaks of "anticompetitive *risks* associated with lifting the restriction," 900 F.2d at 309 n. 29 (emphasis added), a concept that would appear to be antagonistic to the certainty standard.

Moreover, although the burden of persuasion is normally on the proponent of a motion, and that proponent must make his case by a preponderance of the evidence, the appellate mandate places the burden on those opposing the Regional Company motion, and requires them to prove their position by a standard that exceeds even the beyond-a-reasonable-doubt standard applicable to criminal cases.

[117] While *Brown Shoe* involved section 7 of the Clayton Act, the Regional Companies themselves have stressed that contains a "closely analogous standard." Joint Brief for Regional Company Appellants at 54 (filed April 17, 1989), No. 87-5388 (D.C.Cir. 1990). *See also,* II P. Areeda & D. Turner, *Antitrust Law* para. 304a (1990).

[118] *See also,* the reference in the Regional Companies' Reply Brief to the "field of economic prediction and inexact science," quoted at p. 329, *supra.*

Even the President's Council of Economic Advisers, the Federal Reserve Board, and individuals and organizations that invest in the stock market have frequently discovered to their dismay that they are wrong: whatever they may hope for, they surely cannot be certain.

While, as discussed above, the evidence persuades this Court that entry of the Regional Companies into the information services market would allow them quickly to dominate that market and to eliminate both competition and the independents which would make that competition possible, the question under the appellate mandate is whether this Court is *certain* that removal of the information services restriction would have such an effect. The answer to that question is in the negative.

C. Conditions Today

The Court of Appeals opinion is critical of this Court's reliance on the fact that no change had been shown between the conditions that existed in 1982 when the decree was approved and 1987 when this Court issued the "triennial review" decision. 900 F.2d at 308. To remedy that defect, the appellate court held that removal of the restriction would have to be approved if the relevant rights and obligations are within the zone of settlements "consonant with the public interest *today*," 900 F.2d at 307 (emphasis in original), and further, that the "district court should determine whether removal of the information services restriction as applied to the generation of information would be anticompetitive under *present* market conditions." 900 F.2d at 309 (emphasis in original).[119]

It is not entirely clear how broad the Court of Appeals' direction was intended to be. On the one hand, by ruling out any reliance on the fact that no significant change had occurred since the direct evidence of the local operating companies' anticompetitive acts was presented at trial,[120] the appellate court may have also ruled out con-

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[119] Similarly, the appellate court contrasted removals under Section VII of the decree (which, it said, deals with public interest "today") with Section VIII(C) (which concern the question whether the ability to impede competition had changed from the time "when the decree was approved"). 900 F.2d at 307.

[120] The Court of Appeals said that there was "no record to speak of" in the *AT & T* trial regarding information services, and from

sideration of these earlier anticompetitive acts themselves. If there can be no reliance on the lack of change between 1982 and 1987, there can logically be no consideration of the situation as it existed in 1982.[121]

On the other hand, it is possible that, as the Department of Justice contends, the Court of Appeals intended to allow this Court to consider both the evidence of anticompetitive acts prior to 1982 and the evidence that has been added to the record since then.[122] But this would still leave the Court with the very difficult task[123] of basing its decision primarily on theoretical predictions[124]

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this premise it concluded that this Court lacked a factual basis in 1982 for the imposition of the information services restriction (absent the parties' agreement). 900 F.2d at 307. However, this Court noted when it approved that restriction at the Department of Justice's request that this restriction "is necessary for reasons similar to those justifying the restriction on interexchange services. . . ." 552 F.Supp. at 189. And there can be no question but that (1) insofar as the potential for anticompetitive conduct is concerned, the two types of services parallel each other, and (2) there was ample evidence of such conduct with respect to the interexchange market.

[121] Although a decision today regarding the removal of the information services restriction must be made on the basis of present conditions, it is difficult to do so while ignoring what occurred when the local telephone operating companies last had the opportunity to act in a discriminatory fashion on a significant scale because their bottlenecks on local exchange service gave them an unfair advantage. One way to take account of these events so as to bring them up to date is to inquire whether any material change occurred between then and now.

[122] Justice Department Reply Brief at 3-4.

[123] The Court of Appeals recognized that problem, stating that "it may be difficult to decide whether the BOCs would have [market] power if they were allowed to enter a market." 900 F.2d at 296.

[124] It is somewhat ironic that the Department of Justice complains that its opponents are relying "on economic theory alone," and that it counsels against the use of "economic theory divorced from the facts." Reply Brief at 15. The truth is that it is the

of hypothetical market power and hypothetical risks of improper conduct, all of it substantially divorced from the facts for which there is an evidentiary record.

The required focus on predictions on which the various experts are in disagreement thus adds to the weight that must be given to the Justice Department's judgments [125] and it further complicates the search for certainty.

* * * *

To sum up. It is the Court's judgment that in view of the requirements imposed by the Court of Appeals which are summarized above, it could not responsibly [126] and with proper deference to that court rule that the information services restriction must be retained. Accordingly, the Court is ordering simultaneously herewith that the restriction shall be removed.

VIII

The Need For A Stay

The Court will, however, stay the effect of its decision pending the completion of appellate review. While, as indicated, this Court is following what appear to be the most plausible interpretations of the several critical Court of Appeals directions, it must be recognized that some of these directions are not necessarily susceptible of but a single interpretation.

Department that wishes to escape from concrete facts—those that emerged during the *AT & T* trial and in the Tunney Act proceeding—and to rely instead primarily on predictions.

[125] The Department's judgments would obviously have less weight in the context of tangible evidence such as that of Regional Company anticompetitive conduct prior to 1982.

[126] The Court has rejected the alternative of construing the appellate opinion in such a way as to permit it to order the retention of the restriction. *See, e.g.*, Part VIII, *infra*. The Court feels obligated to interpret the opinion of the Court of Appeals as that tribunal most plausibly intended it to be interpreted.

For example, the intervenors argue, with some justification, that the "certainty" ruling may constitute a reference to the Court of Appeals' own obligations rather than those of this trial court. One of the Court of Appeals' references to the certainty standard clearly refers to that court's own obligations on appeal.[127] The references to the Department of Justice can likewise have several meanings: while this Court has been directed to give "serious consideration" to the Department's views on economic theory and on the efficacy of FCC regulation, the appellate court did not indicate what weight is to be given to the evidence adduced by other parties, or whether the term "serious consideration" is to be equated with "decisive effect" irrespective of other considerations. And again, as alluded to above, it may be that, in emphasizing that this Court was to make its findings with respect to current conditions, the Court of Appeals did not intend to rule out substantial consideration of the experience with anticompetitive conduct of the local telephone companies as revealed by the pre-1984 record.

For these reasons, while this Court is not prepared to depart from what appears to be the most plausible reading of the directions of the Court of Appeals (*see* notes 95 and 126, *supra*), and it therefore holds in favor of the Regional Companies, it cannot be certain that its interpretation of the dispositive appellate directions is correct. It follows, of course, that this Court cannot be certain of the correctness of its decision to remove the information services restriction from the decree.

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[127] Said the court, "because we *cannot be certain* that these findings were not infected by the court's legal error. . . ." 900 F.2d at 308 (emphasis added). On the other hand, elsewhere the appellate court's discussion of the certainty concept appears to have broader scope than a reference to appellate duties ("the appropriate question under section VII is whether the proposed modification would be certain to lessen competition," 900 F.2d at 308). *See also, United States v. Western Electric Co.*, 907 F.2d 1205, 1209 n. 7 (D.C.Cir.1990).

Yet if the Regional Companies were to enter the information services market while the critical issues are still as unsettled as they may well be, substantial funds could be spent in reliance on a decision which could subsequently be vacated, and corporate changes could take place on a like reliance both within the Regional Companies and by others now engaged in one or more of the many facets of the information services. It is appropriate, therefore, to stay the effects of this Court's current ruling until finality has been reached in the appellate process,[128] and the Court will do so.

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[128] The stay is entered on the assumption that one or more of the parties or intervenors will appeal, as has been the recent experience. Should appeals not be filed, the stay will of course be dissolved.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5388 through 87-5397 and
88-5276 through 88-5284

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,
NATIONAL CONSUMERS LEAGUE
BLACK CITIZENS FOR A FAIR MEDIA,
Intervenors.

Appeal of PACIFIC TELESIS GROUP, *et al.*
(Two Cases)

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*
(Eighteen Cases)

Appeal of NYNEX CORPORATION
(Two Cases)

Appeal of US WEST, INC.
(Two Cases)

Appeal of AMERICAN INFORMATION
TECHNOLOGIES CORPORATION
(Two Cases)

Appeal of BELLSOUTH CORPORATION
(Two Cases)

Appeal of PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA
(Two Cases)

Appeal of PEOPLE OF THE
STATE OF CALIFORNIA, *et al.*

Appeal of SOUTHWESTERN BELL CORPORATION
(Two Cases)

Appeal of BELL ATLANTIC
(Two Case)

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 82-00192)

Argued Dec. 6, 1989

Decided April 3, 1990

As Amended April 6, 1990

Before MIKVA, EDWARDS and SILBERMAN, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

As part of the 1982 consent decree that severed the seven Regional Bell Operating Companies ("BOCs") from AT & T, the parties agreed that the BOCs, which inherited AT & T's local exchange monopoly, would be prohibited from providing interexchange (long distance) or information services, manufacturing telephone equipment, and participating in any non-telecommunications industry. The district judge retained jurisdiction over the case, and the Department of Justice ("DOJ") pledged to report to the court every three years as to the continuing need for these "line of business" restrictions. In the first such "Triennial Review," after considering the DOJ's report, as well as the comments of the other parties and dozens of other individuals and organizations, the district judge issued two opinions lifting the restriction against BOC participation in non-telecommunication businesses, modifying the restriction against their entering the information services market, and leaving intact the interexchange and manufacturing restrictions. *See United States v. Western Elec. Co.*, 673 F.Supp. 525 (D.D.C.1987);

United States v. Western Elec. Co., 714 F.Supp. 1 (D.D.C. 1988). With the exception of the district judge's ruling dealing with information services—which we reverse and remand—we affirm.

I.

A. *The 1982 Consent Decree*

In 1974, the DOJ filed this antitrust suit against AT & T. After seven years of pretrial proceedings, the case was tried in district court for eleven months but did not culminate in a verdict. Instead, the parties submitted a proposed consent decree to the court for review according to the "public interest" standard prescribed by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h) ("Tunney Act"). After extensive Tunney Act proceedings, and after the parties agreed to certain modifications added by the district judge, the district court approved the decree.[1] *See United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).[2]

Although the district court made no explicit findings of liability in the course of the Tunney Act proceedings, it did examine whether the evidence was sufficient to warrant antitrust relief. *See* 552 F.Supp. at 161. The evidence indicated that AT & T or the "Bell System" was, at the time of the trial, a massive, vertically-integrated enterprise which enjoyed a monopoly in local exchange services, provided long distance service, designed and de-

[1] Although the district court never determined whether the Tunney Act was technically applicable to this case, the parties consented to have the Tunney Act procedures applied. *See AT & T*, 552 F.Supp. at 145.

[2] Justice Rehnquist, joined by two other justices, dissented from the Supreme Court's summary affirmance because they questioned whether the application of an undefined "public interest" standard falls within the judicial power under Article III. *See* 460 U.S. at 1001-06, 103 S.Ct. at 1241-44.

veloped telephone equipment (through Bell Laboratories), and manufactured that equipment at its wholly-owned subsidiary, Western Electric. AT & T used its local exchange monopoly—the so-called "bottleneck"—in a number of ways to promote its own affiliated operations in the long distance and equipment fields. In the interexchange field, other providers such as MCI were dependent on AT & T's local exchange facilities since there was no other way to reach the ultimate consumer. AT & T therefore had a strong incentive to provide more expensive or inferior quality local exchange access to its long distance competitors than it provided to itself. According to the DOJ, despite vigilant FCC attempts to prevent it, AT & T was able to discriminate againts its interexchange competitors and, in that way, to stave off significant interexchange competition. *See* 552 F.Supp. at 160-63.

In the equipment market, the BOC's purchased over eighty percent of the nation's central office switches and transmission equipment and nearly always purchased that equipment from AT & T's Western Electric affiliate, even when those products were more expensive or of lesser quality than equipment available from competing vendors. The BOCs and Bell Labs also preferred Western Electric over competitors by granting it early and otherwise advantageous access to technical data and other information about the BOC's equipment requirements. Finally, there was evidence that AT & T cross-subsidized its equipment prices offered by its Western Electric affiliate using its monopoly revenues from local exchange services, thereby enabling Western Electric to undersell its competitors while telephone consumers were effectively overcharged for their local telephone service. Again, all of this was apparently carried out notwithstanding the FCC's best efforts to stop it. *See* 552 F.Supp. at 190-92.

Under the consent decree, AT & T retained its long distance and equipment manufacturing operations but

agreed to divest itself of its local exchange monopoly, transferring those operations to the BOCs [3] which were to become totally separate from AT & T. In turn, the BOCs were to be limited to the provision of local exchange services and precluded from participating in the markets for interexchange (long distance) services,[4] equipment manufacturing, information services,[5] and all other non-telecommunications businesses. *See* 552 F.Supp. at 227-28. The BOCs were, however, permitted to provide—but not manufacture—customer premises equipment and also to produce, publish, and distribute "Yellow Pages" directories. *See* 552 F.Supp. at 231. These line of business restrictions were premised on the notion that because the BOCs still controlled the local exchange bottlenecks, there was a risk that they would engage in the same sort of anti-

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[3] Under the reorganization plan submitted by AT & T and approved by the court, the 22 BOCs were consolidated into seven Regional Holding Companies. *See United States v. Western Elec. Co.*, 569 F.Supp. 1057 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983). For simplicity, we continue to refer to these Regional Holding Companies as the "BOCs."

[4] According to section IV(K) of the decree, " 'interexchange telecommunications' means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." 552 F.Supp. at 229. "Exchange areas" are geographic areas of jurisdiction established by the BOCs according to criteria set out in the decree. *See id.*

[5] Section IV(J) of the decree defines "information services" as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

552 F.Supp. at 229.

competitive abuses that AT & T had. *See* 552 F.Supp. at 187-91.

Before approving the restrictions, the district judge scrutinized them carefully to ensure "that they will not actually limit competition by unnecessarily barring a competitor from a market." 552 F.Supp. at 186. He rejected as overly simplistic the DOJ's equation of the post-divestiture BOCs with the pre-divestiture Bell System based simply on the proposition that they both possessed a monopoly in local telecommunications. The separated BOCs, the district judge recognized, would be far more manageable monopolists for regulators to oversee than AT & T had been because they would be regional rather than national in scope, they would not be vertically integrated, and, if permitted to enter competitive markets, they would face "the most potent conceivable competitor: AT & T itself." 552 F.Supp. at 187. He therefore ruled that the Tunney Act's public interest standard would permit banning the BOCs from a market only if there was a substantial possibility that the BOCs would use monopoly power to impede competition in that market. 552 F.Supp. at 187. As part of that "public interest" analysis, the district judge undertook a two-part inquiry to determine for each market barred to the BOCs whether (1) the BOCs would actually have the incentive and opportunity to act anticompetitively and (2) whether the participation of the BOCs would contribute to the creation of a competitive market. *See* 552 F.Supp. at 187, 188-94. In addition, the district judge examined the effect of the restrictions on "important public policies." 552 F.Supp. at 187. The district judge ultimately determined that the proposed restrictions were indeed warranted.

The line of business restrictions were not meant necessarily to be permanent, however. The district judge retained jurisdiction [6] and insisted that a mechanism be

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[6] Section VII of the decree is entitled "Retention of Jurisdiction" and reads:

inserted into the decree for removing them at a later date. Rejecting the DOJ's view that mere monopoly power in local exchange services warranted the restrictions, the district judge thought that removal of the restrictions should be governed by a standard that allows a petitioning BOC to prove that there is no substantial possibility that the BOC could use its monopoly power to impede competition in the relvant market. *See* 552 F.Supp. at 195. The district judge therefore drafted, and the parties agreed to, section VIII(C) of the decree, which reads:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) [the line of business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F.Supp at 231. This removal standard was intended to supplant the "test usually applied to a contested modification of a consent decree," set out in *United States v. Swift & Co.* that asks whether " 'unforeseen conditions' " make modification appropriate. *See* 552 F.Supp. at 195 n. 266 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932)). Whether section VIII(C) would also apply to *uncontested* modifications is a question upon which the district court was silent in 1982.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F.Supp. at 231.

B. *The Triennial Review*

When the decree was entered, the DOJ pledged to report to the court on the third anniversary of divestiture and every three years thereafter on the continuing need for the line of business restrictions. Since divestiture was not actually accomplished until 1984, the first such Triennial Review was held in 1987. The DOJ hired an independent consultant, Peter Huber, to conduct in-depth research on the telecommunications industry as a whole as well as on each of the relevant sub-markets. The *Huber Report* provided the factual basis for the DOJ's preliminary submission, filed with the district court in February 1987, in which it recommended the complete removal of the manufacturing, non-telecommunications, and information restrictions as well as the modification of the interexchange restriction. Quite clearly, the DOJ's position—which conceded the continued existence of the BOCs local exchange monopoly—represented a significant change from its position when the decree was entered that mere monopoly power in local exchange services necessitated the restrictions.

After studying the comments of the parties and intervenors on its recommendations, the DOJ formally moved the court—apparently under section VIII(C) of the decree—for the removal of all the line of business restrictions, with the exception of the interexchange restriction. The DOJ was evidently persuaded to alter its position on interexchange services, and it instead asked the court to leave the restriction intact but to grant waivers as soon as local regulation in a given area is lifted. The Department believes that the BOCs' bottleneck monopolies persist primarily because of local regulation which, if removed, would allow potentially competitive access alternatives to be made available by new technology. The seven BOCs also filed motions under section VIII(C) of the decree asking for complete removal of all the line of business restrictions.

The district court held proceedings in which interested persons were invited to comment and respond to the report and the motions. With respect to the non-telecommunications and information services restrictions, all of the parties to the original decree—AT & T, the BOCs, and the DOJ—as well as the FCC agreed that the restrictions should be removed.[7] AT & T opposed any modification of the other restrictions, thus making those BOC motions undeniably "contested." Not surprisingly, numerous existing participants in the markets that the BOCs sought to enter intervened and vigorously opposed each of the proposed modifications. And, as noted above, the DOJ opposed the complete removal of the interexchange restriction.

After discussing the standard for removal of restrictions under section VIII(C) of the decree, the district judge determined that the BOCs still possessed a bottleneck monopoly over local exchange service. *See* 673 F.Supp. at 536-40. The court then analyzed each line of business restriction to decide whether the BOCs had nevertheless met their burden under section VIII(C) to warrant removal. In reviewing the restriction concerning nontelecommunications businesses, the court noted that it had routinely reviewed and granted requests to waive this restriction since the decree became operational in 1984. Despite losing the safeguards that the waiver process afforded by virtue of the conditions imposed whenever a waiver was granted,[8] the district court removed the restriction entirely because potential competitors did not actively

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[7] AT & T stated that it did not oppose information services relief for the BOCs but argued that any modification of that restriction should be made pursuant to section VII of the decree, not under section VIII(C).

[8] The court normally required the BOCs to operate the competitive business through a separate subsidiary that would obtain its own debt financing. Furthermore, the total net revenues for all

oppose the removal and because cross-subsidization is more difficult in enterprises unrelated to telecommunications. *See* 673 F.Supp. at 599. In addition, the court asserted that lifting the restriction would eliminate a significant burden on BOCs' business planning and free the court from unnecessary and detailed oversight of BOC decisions. *See id.*

The district judge left largely intact the decree's so-called "core" restrictions—those regarding interexchange services, manufacturing, and information services. The manufacturing and interexchange restrictions remained completely unchanged since the district court rejected arguments that circumstances had changed since the issuance of the decree so as to justify the BOCs' entrance into those markets under the standard imposed by section VIII(C). The district judge did grant partial relief to the BOCs on the information services provision but rejected the request of the DOJ and the BOCs to remove the restriction entirely for much the same reasons as he left the manufacturing and interexchange restrictions in place. The court asserted that information services are vulnerable even to slight manipulation and discrimination in access or transmission quality, thereby making it especially easy for the BOCs to use their bottleneck monopolies anti-competitively if they entered the market. *See* 673 F.Supp. at 566. Nevertheless, the information restriction was lifted insofar as it prevented the BOCs from providing transmission of information services generated by others. *See* 673 F.Supp. at 587-97. The district judge described the economic and social advantages of making information services more widely available and noted that the tele-

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non-telecommunications activities engaged in by a single BOC were limited to ten percent of that company's total net revenues. These conditions were designed to minimize the risk of cross-subsidization and to guarantee that the BOCs would not neglect their primary responsibility of providing local telephone service. *See* 673 F.Supp. at 598.

phone system was perhaps the only means of accomplishing that goal, because it uniquely offers providers a means "to reach large, dispersed audiences over reasonbly priced, interactive facilities." 673 F.Supp. at 564. So long as the BOCs do not compete with the companies that *generate* the information services, the district judge reasoned, they would have an incentive to afford the widest, fastest, and highest quality access and transmission to all information providers, thereby maximizing their own revenues. This determination was further explained and substantially reaffirmed by the district judge following a separate proceeding held to work out the details of the information services restriction. *See* 714 F.Supp. at 1. All of these rulings have been appealed.

II.

A. *Standard of Review*

We have repeatedly held that the construction of a consent decree (indeed of this particular consent decree) is subject to *de novo* appellate review. *See United States v. Western Elec. Co.*, 894 F.2d 1387, 1390 (D.C.Cir. 1990); *United States v. Western Elec. Co.*, 846 F.2d 1422, 1427 (D.C.Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 306, 102 L.Ed.2d 325 (1988); *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C.Cir.1986), *cert. denied*, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987); *see also United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971). "We read the Decree essentially as we would a contract. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 [95 S.Ct. 926, 934-35, 43 L.Ed.2d 148] (1975); *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C.Cir.1986) ("*Western Elec. II*"), *cert. denied*, 480 U.S. 922 [107 S.Ct. 1384, 94 L.Ed.2d 698] (1987). Thus, while the meaning of the Decree's terms 'must be discerned within its four

corners,' *United States v. Armour & Co.*, 402 U.S. 673, 682 [91 S.Ct. 1752, 1757, 29 L.Ed.2d 256] (1971), our inquiry is guided by conventional 'aids to construction,' including 'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .' *ITT Continental Baking Co.*, 420 U.S. at 238 [95 S.Ct. at 935]." *United States v. Western Elec. Co.*, 894 F.2d at 1390.

Appellees nevertheless urge us to employ an "abuse of discretion" standard of review, arguing that what we are reviewing here is the district judge's decision not to modify the consent decree—subject to review only for abuse of discretion, *see System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647-48, 81 S.Ct. 368, 371-72, 5 L.Ed.2d 349 (1961) —rather than his interpretation of the decree. We think that is an inaccurate description of this proceeding. At least insofar as the district court was faced with motions brought under section VIII(C), it was not asked by any appellant to modify the decree; it was asked to apply it. To the limited extent that that process might require the district judge to find facts (for instance, to determine whether the BOCs still possess monopoly power over local exchange services), we would review under a clearly erroneous standard. *Cf. City of Las Vegas v. Lujan*, 891 F.2d 927, 931 (D.C.Cir.1989). But the legal standard for lifting the line of business restrictions pursuant to a BOC motion is explicitly provided by section VIII(C) of the decree and therefore the district judge need not "balance [any] imponderables," *Wright*, 364 U.S. at 648, 81 S.Ct. at 371, in deciding whether to remove them as he might in a case seeking modification. Indeed, the district court enjoys no equitable discretion at all in applying section VIII(C); if the petitioning BOC makes the required showing, the district court "shall" remove the restriction. Therefore, aside from fact-finding, we owe no deference to the district court's decisions under section VIII(C). And to the extent that we review the district

court's conclusions about the scope of the applicability of section VIII(C) (as opposed to section VII) for modifications, that is clearly a pure question of law subject to plenary review.[9]

Further, we reject the suggestion—apparently embraced by other circuits, *see, e.g., Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir.1986)—that this particular district judge's interpretations should be afforded some "special" deference because he drafted the pivotal provision of the decree, section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception. In addition to our discomfort with the concept that the degree of deference we afford should depend even in part on the identity of a district judge hearing the case below, we also note that appellate courts do not normally defer to anyone else's non-contemporaneous interpretations of the Constitution, statutes, cases, or contracts—whether or not the interpreter was also the drafter of the language at issue. When we defer to agency interpretations of their own ambiguous statutes, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), or of contracts, *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C.Cir.), *cert. denied*, 484 U.S. 869, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987), we do so on the assumption that Congress delegated to departments or agencies the reconciliation of agency policies implicated in that function—institutional concerns not present when we review district court opinions.[10]

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[9] We need not decide here whether "abuse of discretion" is the proper standard for reviewing the district court's decisions concerning modification under section VII—where the district judge is apparently called upon to apply a public interest standard. *But cf. Maryland v. United States*, 460 U.S. 1001, 1001-06, 103 S.Ct. 1240, 1241-44, 75 L.Ed.2d 472 (1983) (Rehnquist, J., dissenting).

[10] In interpreting the decree, we do, however, take careful account of the explanatory opinion issued by the district judge at the time

B. *Applicability of Section VIII(C)*

Except for some BOC petitions regarding information services, the BOCs and the DOJ brought, and the district court analyzed, all of the motions to lift the line of business restriction under the standard set out in section VIII (C) of the decree. It is unclear to us, however, that section VIII(C) applies at all to some of those motions. In the first place, section VIII(C) refers to "a showing by the *petitioning BOC*," and thus, on its face contemplates only petitions brought by BOCs. The DOJ's hardline position in favor of the restrictions in 1982 further indicates that when the parties agreed to the decree, none of them contemplated that the DOJ would seek to invoke section VIII(C). We do not see, therefore, how the DOJ can petition for removal of restrictions under section VIII(C).[11] That is not to suggest that if section VIII(C) is not available to the DOJ no avenue for requesting modification would be open to it. Section VII explicitly provides for modifications of the decree, and the district court would possess equitable power to modify the decree even if section VII were not included, *see United States v. Swift & Co.*, 286 U.S. 106, 114-15, 52 S.Ct. 460, 462-63, 76 L.Ed. 999 (1932).[12] Furthermore, as a

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the decree was entered, *see* 552 F.Supp. at 131, although we are, of course, not bound by it, *see United States v. Western Elec. Co.*, 846 F.2d at 1429.

[11] When pressed at oral argument about the applicability of section VIII(C) to DOJ motions, counsel for the Department stated, surprisingly, that the Government had "no position" on the matter, noting that the Court had "not asked [the Department] to argue" that issue.

[12] The Government *opposed* the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the *DOJ* under section VII. Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act. Still, it is

party to the decree, the DOJ's position on any BOC petition would be considered by the district court in much the same way as is an intervenor's views—whether it supports or opposes the petition. Strictly speaking, however, only the BOCs can be petitioners under section VIII(C).

We also believe that section VIII(C) does not apply to proposed modifications that are agreed to by all the parties to the decree, such as the motions for removal of the restrictions on BOC entry into the information services field. Section VIII(C) speaks of a "*showing* by the *petitioning* BOC," thereby indicating that it applies only to contested motions for removal—and this reading comports with the intent of the parties as expressed to the district court in 1982. *See infra* Part III.C.1. As we explain more fully in Part III of this opinion, uncontested motions for modification—those involving the information services and non-telecommunications businesses restrictions—should be treated by the district judge under section VII of the decree, and should be approved so long as the modifications satisfy the "public interest" standard embodied in the Tunney Act. Thus, while both the district judge and the parties treated the removal of the line of business restrictions as though it were governed entirely by section VIII(C), that section was really the appropriate standard only for the BOC petitions for removal of the manufacturing and interexchange restrictions—the former opposed by AT & T and the latter by both AT & T and the DOJ.

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true that the line of business restrictions were part of what AT & T bargained for in the original decree, therefore suggesting that the modification requests that AT & T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass judgment on this issue here since the DOJ brought no motion under section VII.

C. *The VIII(C) Standard*

The proper construction and application of section VIII(C) is nonetheless critical in reviewing the district court's decision not to remove the manufacturing and interexchange restrictions. There is no dispute, at least not on appeal, that the BOCs still possess their bottleneck monopolies in local exchange services. Despite certain technological innovations, only a minute percentage of telephone users can bypass the local exchange carriers for any of their calls. *See* 673 F.Supp. at 536-40. The question under VIII(C), then, is whether any petitioning BOC has made a showing "that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Given the enormous legal resources expended on the issue, it is hardly surprising that the parties hotly dispute the meaning of the quoted phrase and the proper scope of the district judge's inquiry in deciding whether the standard has been met. According to both the DOJ and the BOCs, the district court's analysis suffered from several flaws: (1) misconstruing the actual terms of section VIII(C) quoted above; (2) failing to accord deference to the recommendations and opinions of the DOJ and FCC; and (3) taking into account allegedly irrelevant factors while ignoring or discounting critical changes in the industry since the decree.

We begin with a close parsing of section VIII(C)'s terms. Section VIII(C) requires a BOC to show that there is no "*substantial* possibility that it could use its monopoly power to impede competition." According to the DOJ and the BOCs, the district court altered the decree by implicitly equating the phrase "substantial possibility" with a mere theoretical possibility. Since the BOCs concede that they could always theoretically use their local exchange monopolies to impede competition, they claim that this putative misreading was tantamount

to a ruling that retention of the local exchange monopolies precludes relief from the interexchange and manufacturing restrictions under section VIII(C). They base this argument on the district court's statements to the effect that the local monopolies "continue to provide the same basis for anticompetitive activity as they did prior to the Bell System breakup." 673 F.Supp. at 543. While we do not read the district court's opinion, as appellants do, to have amended the decree, *see, e.g.*, 673 F.Supp. at 536 n. 42 (explicitly rejecting the contention that "the restrictions are justified by the mere fact that a monopoly exists in an area"), the importance of the word "substantial" should not be minimized. The ultimate burden under section VIII(C) remains on the petitioning BOC,[13] but the requirement that the possibility of using its monopoly power to impede competition be "substantial" relieves the BOC of the essentially impossible task of proving that there is absolutely no way for it to use its monopoly power to impede competition. For example, the district judge's speculation that the BOCs could impede competition by way of illegal (and perhaps criminal) collusion to divide markets among them according to territory, *see* 673 F.Supp. at 558, would, in the absence of supporting evidence, seem to qualify only as a theoretical possibility.

The parties also differ markedly concerning what precisely is meant by section VIII(C)'s ambiguous phrase

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[13] We do not agree with the district judge, however, that the BOCs' burden is "particularly heavy" because of the litigants' and the public's interest in the finality of judgments or because would-be competitors of the BOCs invested "billions of dollars" in reliance on the line of business restrictions. *See* 673 F.Supp. at 533 n. 25. Any enterprise that read the decree and the district court's 1982 opinion could not reasonably have relied on the perpetual enforcement of the line of business restrictions in light of the inclusion of section VIII(C) and the explicit pledge to review the continuing need for the restrictions every three years. And any interest that any party conceivably has in the "finality" of this judgment is necessarily tempered by the same factors.

"*impede competition* in the market it seeks to enter." According to the DOJ, a BOC cannot impede competition in a given market unless it has market power—the ability to restrict output and/or raise prices. AT & T argues that the district court's 1982 opinion equated impeding competiion with "leveraging" monopoly power, something that AT & T claims a BOC can do so long as its local exchange monopoly is also an "essential facility" for the market it seeks to enter. Whatever it means to "leverage" one's monopoly power, the DOJ is surely correct that no damage to competition—through "leverage" or otherwise—can occur unless the BOCs can exercise market power. *Cf. General Leaseways, Inc. v. National Truck Leasing Ass'n,* 744 F.2d 588, 596 (7th Cir.1984). To be sure, it may be difficult to decide whether the BOCs would have such power if they were allowed to enter a market. Moreover, it may be necessary to refine the analysis to deal with markets in which self-dealing bias is a risk, such as the production of central office switches and transmission equipment. In those markets, a BOC might be able effectively to raise prices (disguised as costs in the local exchange market) or restrict output—thereby impeding competition—in the segment it controls or forecloses. *See infra* Part III.B. The district court, however, was apparently concerned with the possibility that BOC entry into new markets would disadvantage or destroy small and innovative firms in those markets. *See, e.g.,* 673 F.Supp. at 561 (castigating the DOJ for its indifference to the possible destruction of "many high-quality firms producing high-quality goods that have emerged since divestiture"). New entry or increased competition in any market typically hurts and sometimes even destroys existing competitors. A court's solicitude for those firms—ostensibly in an effort to foster competition—may well come at the expense of competition. *Cf. Cargill, Inc. v. Monfort,* 479 U.S. 104, 115, 107 S.Ct. 484, 492, 93 L.Ed.2d 427 (1986). Accordingly, unless the entering BOC will have the ability to

raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power to "impede competition."

And while there may be some complexities in defining precise boundaries of the relevant market, one thing that is clear from section VIII(C) is that it is the "market [the BOC] seeks to enter" that matters, and *not* the local exchange market. For the most part, then, the district court should decide motions under section VIII(C) without regard to the effect BOC entry into new markets will have on local service ratepayers. Concern for the ratepayers' welfare is primarily the responsibility of the FCC and state regulators, not the district court. Appellees make much of DOJ's prior position before the district court when the decree was entered when the Department urged the court to consider the interests of ratepayers in its evaluation and implementation of the decree. The DOJ concedes the shift, and the only explanation we are given is its statements in two footnotes of its brief that it now believes, contrary to its stance in 1982, that line of business restrictions should not be used—indeed, cannot be used under section VIII(C)—to protect ratepayers of local exchange services rather than solely to protect competition in unregulated markets. While this may have been the DOJ's contention at the time, we see no clear evidence that ratepayer protection was part of the "contemporaneous understandings of [the decree's] purposes," 846 F.2d at 1427. And, in any event, we believe the text of the decree generally forecloses the goal of ratepayer protection by the use of the words "the market [the BOC] seeks to enter."

In that regard, to the extent that the district court's consideration of cross-subsidization focused on the danger that the BOCs would overcharge local ratepayers, it was misconceived. *See, e.g.*, 673 F.Supp. at 557, 572. Cross-subsidization is relevant under VIII(C) insofar as it may be used to price below cost in the competitive market,

and thereby unfairly to acquire power and impede competition in that market. Still, the impact on the local exchange market of allowing BOC entry into a new market might well be relevant under section VIII(C) if the BOC is likely to be its own primary customer in the entered market, as with production of central office switches and transmission equipment. In that case, cross-subsidization or cost misallocation that allowed a BOC to pass on its (inflated) equipment costs to the local ratepayers would likely be the primary manifestation of market power and might constitute an impeding of competition *in the entered market. Cf.* 3 P. AREEDA & D. TURNER, ANTITRUST LAW, ¶ 726 (1978).

Appellants also fault the district court for failing to give deference to the views of the FCC and the Justice Department with respect to the BOC petitions under section VIII(C). The Justice Department's interpretation of the law is not normally given deference in a civil or criminal case; in federal courts, departments' and agencies' legal views are deferred to only when they make a determination (either quasi-legislative or quasi-judicial) that has independent legal significance—as opposed to when they act in a prosecutorial role. *See Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285 (D.C.Cir.), *aff'd by an equally divided court*, —— U.S. ——, 110 S.Ct. 398, 107 L.Ed.2d 277 (1989) Still it must not be forgotten that the Justice Department has the "principal responsibility for enforcing the Sherman Act." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 14, 99 S.Ct. 1551, 1559, 60 L.Ed.2d 1 (1979). Therefore, although we see no doctrinal basis for the district court to defer to the DOJ's interpretation of the decree or its views about antitrust law, it is to be expected that the district court would seriously consider the Department's economic analysis and predictions of market behavior. Indeed, it would seem that that is precisely why the district judge required the Department to

report to the court every three years concerning the continuing need for the restrictions imposed by the decree. *See* 552 F.Supp. at 195.

Economic analysis and market predictions are not an exact science. Antitrust scholars and courts have changed their views somewhat over the last fifty years concerning the interrelationship of the antitrust laws and market behavior. *Compare, e.g., United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) *with Continental T.V., Inc v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (overruling *Schwinn* after determining that its *per se* rule against vertical nonprice restraints was not economically sound). *Also compare* Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U.PA.L.REV. 1214 (1977) (arguing that economic efficiency is not the sole goal of the antitrust laws) *with* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103-113 (1978) *and* R. BORK, THE ANTITRUST PARADOX 50-89 (1978) (agreeing that courts should treat antitrust laws as designed solely to advance consumer welfare and efficiency). Consequently, we recognize that the DOJ may change its views—to incorporate different policy concerns—over time. That is not to say that we do not have any sympathy for the district court's attitude toward the DOJ's position changes in this Triennial Review. As we noted above, the DOJ in 1982 wanted the line of business restrictions to remain in place unless and until the BOCs lost their local exchange monopolies. With little warning or explanation, the DOJ completely altered its stance and is now generally hostile toward the restrictions. In the absence of a complete explanation of how and why the DOJ's position had changed, the district judge was understandably uneasy about relying on the DOJ in this first Triennial Review since to do so would be to undo much of the decree after only three years' time.

The FCC's claim to deference is perhaps even more puzzling to analyze. The FCC argues that the district court acted improperly when it evaluated the effectiveness of the FCC's regulatory scheme since that is solely the function of a court of appeals pursuant to direct review as provided by the Communications Act. The problem with this argument is that a court of appeals reviews FCC regulations only if they are challenged and only to ensure that they are not arbitrary and capricious. The district court below, however, was *obliged* to determine ultimately whether the FCC's regulations would effectively prevent the BOCs from using their monopoly power to impede competition in the markets they sought to enter. *Cf.* 846 F.2d at 1433. The very premise of this case was that the FCC could not effectively control AT & T. We think it would therefore have been an abdication of judicial responsibility for the district court to assume that the FCC's regulations would be effective merely because they had not been found to be arbitrary and capricious.

On the other hand, we recognize the institutional amomaly presented by a district judge placed in the position of evaluating the effectiveness of a federal agency's regulatory program. The DOJ, which brought this action based on its view that the FCC was incapable of preventing AT & T's abuse of monopoly power, would appear to be in a better position, both institutionally and practically, to evaluate the FCC's regulatory effectiveness. And, therefore, we would expect the district court to consider the Department's comparative advantage in performing that task. However, two of the principal FCC regulations that bear on this appeal, the *Joint Cost* and the *Computer III* rules, had not been finally implemented at the time this case was submitted to the district court. Thus the DOJ's assessments of those regulations that are in the record of this appeal are necessarily speculative. *See e.g., infra* notes 16, 17, 21. Rather than hazard our own,

necessarily under-informed, appraisal of how these rules have performed in the three years since this case was presented to the district court, we think it is more prudent to await the DOJ's assessment in subsequent Triennial Reviews.[14]

Appellants further argue that the district court erred in its application of section VIII(C) by considering factors it should have ignored while ignoring some that it should have considered. Most importantly, appellants take issue with the minimal significance that the district court placed on the break-up of AT & T's local exchange monopoly into seven separate BOCs in deciding whether to lift the line of business restrictions. The decree was premised on the notion that the BOCs would have both the incentive and the ability to use their local exchange monopoly to impede competition in these markets, therefore necessitating the line of business restrictions. *See* 552 F.Supp. at 187. Under section VIII(C), therefore, the BOCs must establish that something is different now from the time when the decree was entered so that they can no longer use their monopoly power to impede competition. Obviously, if all conditions and assumptions remain the same now as when the decree was entered, no relief can be due under section VIII(C).

While we reject the BOCs overly loose reading of the restrictions under section VIII(C), we also reject the appellees' overly rigid interpretation of those restrictions. The appellees appear to insist that the standard under section VIII(C) requires a finding of some *unforeseen* changed circumstances as an ingredient of the petitioners' showing necessary to justify removal of a line-of-business restriction. This construction finds no support in the

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[14] Assuming after remand the BOCs are permitted entry into the information services market, we would also expect the DOJ's reports concerning BOC behavior in that market as well as the effectiveness of applicable FCC regulation to be critical in subsequent Triennial Reviews.

language of the decree. Rather, the decree provides that a petitioning BOC is entitled to relief under section VIII (C) so long as it can prove that its ability to impede competition is no longer present. It would make no difference whether the circumstances leading to that conclusion were entirely foreseen or even if they could not be discretely identified. Indeed, even if the economic assumptions or market predictions which governed the decree turned out to be in part wrong, the BOCs might thereby be entitled to relief under section VIII(C).

To be sure, as the district court noted, the mere existence of seven BOCs in place of the prior unified Bell System is not by itself a significant factor. Not only was it the very product of the decree, the seven continue to exercise monopoly power in the local exchange market. However, the other conditions in the various telecommunications markets wrought by divestiture and the behavior of the BOCs since divestiture are appropriately considered under section VIII(C), even if they were foreseen by the parties or incorporated into the fabric of the decree. These are not limited to obvious changes such as new competitors that did not exist or were not stable at the time of the decree. The court also may properly consider the manner in which the seven BOCs behave competitively against each other, AT & T, and other firms, as well as the way in which the various markets have evolved since the decree. It was feared, for instance, at the time the decree was entered that the BOCs would favor one another and AT & T over unrelated firms, a concern that now appears unfounded. Also appropriately considered in the section VIII(C) calculus is the asserted existence of "benchmarks" for comparing BOC performance. According to appellants and the FCC, these benchmarks would make it far easier to regulate the BOCs than the old Bell System if the BOCs were permitted to enter other markets. That the "possibility of the existence of benchmarks was necessarily included in the decree assumption

which imposed the restrictions." 673 F.Supp. at 547, makes them no less significant under section VIII(C). Indeed, the greater ease with which the FCC can regulate the BOCs merely because they have a monopoly in only one geographic portion of one of the markets controlled by AT & T prior to the decree—although clearly contemplated (and therefore foreseen) at the time of the decree, *see* 552 F.Supp. at 187—is properly considered under section VIII(C). Of course, the district court still legitimately imposes on the petitioning BOCs the burden of making the requisite showing.

Finally, we consider appellants' claim that the district court strayed beyond the competitive analysis mandated by section VIII(C) when it considered the impact of removing the restrictions on various public policies, including the welfare of local ratepayers, innovation in the manufacturing market, the goal of universal telephone service, first amendment values, and the United States' position in international trade. The district court explained its discussion of these factors by noting that "the same standards may be applied in proceedings addressing continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place." 673 F.Supp. at 583. We disagree. When the district court entered the decree in 1982, it decided—as it was required to do under the Tunney Act—whether the decree was in the public interest. Whatever the substance of the "public interest" standard, it is surely more far-ranging than the section VIII(C) standard. When a BOC petitions under section VIII(C) for the removal of a line of business restriction, section VIII(C) itself defines the limits of the district judge's inquiry. If a BOC makes the showing called for by section VIII(C), the district judge may not, for example, deny the motion because of the possible impact on the United States' bal-

ance of trade, or for any other reason not related to the antitrust laws.[15]

III.

We turn next to the district judge's rulings on the BOC motions to remove the interexchange and manufacturing restrictions. As we noted above, the BOC motions to remove these two restrictions were the only motions properly analyzed under section VIII(C) of the decree. We therefore need not separately consider the DOJ's motions, which were brought explicitly pursuant to section VIII (C), to the extent that those motions are different in substance from the BOC motions.

Despite our disagreements with the district judge concerning the matters described above, we agree that the BOCs did not satisfy their burden in this Triennial Review of showing that there was no substantial possibility that they could use their monopoly power to impede competition in these markets. On appeal, the DOJ and the BOCs focus their criticism on the district court's analysis and the standard it applied. As such, they ask us to remand for reconsideration under the "legally correct VIII(C) standard." Since we conclude that the district court reached the correct results on the motions properly considered under VIII(C), there obviously is no reason to remand those motions to the district court.

A. *Interexchange Services*

The BOCs, supported by the FCC but not the DOJ, argue that the interexchange restriction should be removed in spite of the conceded persistence of their local

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[15] The district judge explicitly stated that his considerations of some of the public policies mentioned above "d[id] not have an actual impact on the Court's decisions." 673 F.Supp. at 580. While that disclaimer makes it somewhat unusual that he would include the sections of his opinion expressly dealing with those public policies, we take the district judge at his word.

exchange monopoly—upon which interexchange carriers rely for access to ultimate consumers—because changed circumstances since the decree would prevent them from impeding competition if they were permitted to enter the market. The DOJ opposes the BOCs' petition.

The district court noted that the interexchange market is currently competitive. Even though AT & T still retains a lion's share of the market, there are hundreds of long-distance carriers in the United States, eight of them serving twenty-five or more states. *See* 673 F.Supp. at 550. This apparently undisputed fact leads the district court to the curious observation that "the entry of the [BOCs] into that market is not necessary to give it vitality." *Id.* Section VIII(C) does not put the BOCs in the "Catch-22" that the district judge seems to imply by that statement—that the restriction will not be lifted if the market to be entered is not competitive because the BOC will grab and wield market power nor will it be lifted if the market to be entered is highly competitive because the BOCs' presence is not "necessary." If the market to be entered is sluggish or concentrated, that might be an argument in favor of allowing BOC entry, although it might also make it easier for a BOC to acquire market power. But if the BOC wants to enter a *competitive* market, that is a powerful reason to grant the section VIII(C) petition since there is less of a danger that the BOC will be able to seize and wield market power.

Nevertheless, we agree with the district court's conclusion regarding the changes in the interexchange market. The crux of the BOCs' argument is that equal access for all interexchange carriers has been achieved and cross-subsidization eliminated, thus closing off the primary way for the BOCs to acquire market power anticompetitively. This has allegedly come about primarily through FCC regulation that was made more effective by the fragmenta-

tion of the Bell System's local exchange monopoly into seven BOCs. As we indicated above, even though the mere existence of the seven BOCs is not a significant consideration under section VIII(C), the break-up is critically important insofar as the FCC has been able to adopt its regulations to the more manageable task of overseeing seven regional monopolies instead of one national, vertically-integrated one. *See* 552 F.Supp. at 187. On this point, we think the DOJ's assessment of the FCC's regulations is entitled to significant weight. According to the DOJ, those regulations, combined with the BOCs' own equal access plans have "eliminated most of the anti-competitive advantages of AT & T formerly enjoyed." At the time this case was before the district court, however, the DOJ asserted that "the FCC's equal access rules are based on the assumption that the BOCs will not provide interexchange services. Thus the FCC has not yet developed rules that would apply to nondiscrimination and cost separation principles of the *Computer III* [16] and *Joint Cost* [17] proceedings to BOC provision of interexchange services." And until those regulations are adjusted to take account of BOC entry into the interexchange market—entry which would, of course, provide an incentive to deny equal access and to cross-subsidize if possible—the DOJ represents that equal access and proper cost allocation cannot be assured.

The DOJ also points out that violations of the equal access policy are extremely difficult to detect and remedy, *see* 846 F.2d at 1424-25, thereby underscoring the danger of allowing entry before the FCC's regulations are designed

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[16] 104 F.C.C.2d 958 (1986), *on reconsideration*, 2 F.C.C.Rcd 3035 (1987), 3 F.C.C.Rcd 1135 (1988), *appeal docketed sub nom. California v. FCC*, No. 87-7320 (9th Cir. May 28, 1987).

[17] 2 F.C.C.Rcd 1298, *on reconsideration*, 2 F.C.C.Rcd 6283 (1987), *on further reconsideration*, 3 F.C.C.Rcd 6701 (1988), *petition for review denied sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir.1990).

to deal with the problem. Finally, the DOJ warns that the BOCs will have an easier time acquiring market power in the interexchange market than in other markets because many of the firms that began providing interexchange services after the decree have not yet become stable in the highly capital-intensive field. Since the BOCs raise no serious opposition on appeal to any of these points made by the DOJ and since we have no other reason to doubt the DOJ's assessments, we affirm the district judge's conclusion that the BOCs failed to show that there was no substantial possibility that they could use their monopoly power to impede competition in the interexchange market.[18]

B. *Manufacturing*

The "manufacturing restriction," imposed by section II(D)(2) of the decree and amended by section VIII(A) is really more properly conceived of as two restrictions. First, it forbids the BOCs from manufacturing (but permits them to provide) customer premises equipment ("CPE"), which "includes equipment employed on the premises of anyone other than a carrier that is utilized to originate, route, or terminate telecommunications." 673 F.Supp. at 552 n. 116. Second, it prohibits the BOCs from manufacturing or providing telecommunications equipment, that is, equipment other than CPE used by a carrier to provide telecommunications services. *See id.* The BOCs petition, with DOJ support, for the complete

[18] The BOCs pressed the argument below that the interexchange restriction should be removed because the Justice Department agreed to, and the district court accepted, a consent decree in an antitrust action against GTE that did not include line of business restrictions. *See United States v. GTE Corp.*, 603 F.Supp. 730 (D.D.C. 1984). This claim was not raised on appeal and so we do not discuss it. We also have no occasion to discuss the suggestion made by the DOJ below, but dropped on appeal, that the restriction should be lifted with respect to cellular radio, paging, and other mobile interexchange services.

removal of the manufacturing restriction, and the district court left the restriction intact.

1. *Telecommunications Equipment*

The BOCs and the DOJ argue that market changes since the decree and regulatory adaptations to the post-divestiture market warrant removal of the telecommunications equipment restriction. The Justice Department further divides the telecommunications equipment market into separate markets for central office switches and for transmission equipment (primarily metal cable). The DOJ makes the significant concession that any BOC that chooses to manufacture central office switches, either unilaterally or through a joint venture, will buy all (or nearly all) of its requirements from the affiliated producer—thereby foreclosing a certain portion of the market, whether or not there are economies to be gained from such integration.[19] Nevertheless, the BOCs will not impede competition (although competitors will surely be hurt) in the switch market, it is argued, because large economies of scale would prevent any BOC from remaining in the market solely to sell to itself. Even the largest BOC buyer of switches in 1985 purchased only 1.4 million lines of new switching capacity, about 17 percent of the U.S. market. Only two other BOCs purchased over one million switches and two BOCs bought less than 500,000. *Huber Report* at 14.8. The *Huber Report* estimates that switch producers must sell upward of 1.5 million switches per year to survive and many more to be profitable. *Huber Report* at 14.15-14.16. Of the three major U.S. switch producers, two (AT & T and Northern

[19] This latter admission moots any suggestion that the district court should have balanced the asserted economies of vertical integration against the anticompetitive danger of BOC entry into the market. We express no opinion as to whether such a balance would be the proper subject of litigation in future Triennial Reviews. *Cf.* 673 F.Supp. at 560.

Telecom) sold over 4.5 million switches in the U.S. in 1985, and perhaps twice that many worldwide. The third (GTE) sold only about 1.5 million switches in 1985 and is losing money in its equipment businesses. *Huber Report*, 14.8, 14.14-14.15. Assuming that there are not joint ventures among BOCs (which the DOJ admits would alter its assessment), the DOJ argues that only a few BOCs would enter the switch market and those that did could not afford to produce idiosyncratic (or overpriced) switches since they would have to attract at least some significant number of nonaffiliated buyers who, of course, can choose among many producers.

The DOJ further concedes, however, that the image they convey of the efficient BOC producer of switches is somewhat clouded by the danger of anticompetitive interconnection discrimination and of cross-subsidization. The risk of interconnection discrimination, by which a BOC would design its switches in a way that would favor the BOC's self-produced equipment over rival manufacturers, has allegedly been "substantially decreased" by more effective regulatory control—especially the availability of benchmark comparisons among the BOCs.[20] Cross-subsidization is a "plausible concern" in the switch market, the DOJ tells us, because of the need to attract a large market share, the extensive shared costs with local exchange services (especially research and development) ("R & D"), and traditional difficulty encountered by regulators in discovering cost misallocations. Indeed, ac-

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[20] The DOJ also noted that the so-called "Open Architecture" or ONA requirements, an integral part of the FCC's *Computer III* rules, might provide another obstacle to a BOC's ability to discriminate. When the case was presented to the district court, however, the DOJ represented that "it is unclear just what the impact of ONA on the potential for discrimination will be and how those effects will vary from market to market." For that reason, we do not understand how a court could be expected to rely at all in this Triennial Review on the asserted efficacy of the FCC's *Computer III* rules.

cording to the DOJ, a BOC "might not have to produce efficiently to attract its own operating companies as buyers if regulators did not prevent recovery of excessive switch costs." And while the risk of cross-subsidization cannot be eliminated completely, FCC regulation—especially the availability of benchmarks to enforce effective accounting rules—would "significantly mitigate" it.[21] Finally, the DOJ maintains that a small amount of cross-subsidization would not impede competition in the entered market; rather its primary effect would be to raise the price of local exchange service, a problem that the DOJ suggests is to be handled by regulators and is irrelevant to this proceeding.

The DOJ's assessment of the transmission equipment market is substantially similar to that for central office switches. In the transmission equipment market, as was true of central office switches, any BOC would purchase all or most of its own equipment from its own manufacturing affiliate; not all BOCs would manufacture every type of transmission equipment. There is some danger of discrimination and of cross-subsidization, but, due in large part to the availability of benchmark comparisons, that risk is substantially less than it was prior to divesti-

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[21] The DOJ also pointed to the FCC's *Joint Cost* proceeding which, it argues, will give the BOCs the incentive to develop accounting rules that are acceptable to the FCC in order to escape from the separate subsidiary reqirements for BOC provision of enhanced (information) services and CPE. Whatever merit there might be in this argument—and we note that the district judge thought there was very little—we need not even consider it in this Triennial Review since the *Joint Cost* rules had not been implemented at the time this case was brought. *See* 673 F.Supp. at 572. Furthermore, we note with some discomfort that at least some of the BOCs were petitioning this court to strike down as arbitrary and capricious one of the central aspects of the *Joint Cost* rules designed to deal with the cross-subsidization problem while simultaneously pointing to the *Joint Cost* rules in this appeal as effectively ending the cross-subsidization danger. *See Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir.1990).

ture. Among the salient differences is that the market has supported competition even though the BOCs have already been allowed to provide transmission equipment in the form of CPE, and therefore already possesses an incentive to discriminate in interconnection. In addition, cross-subsidization is allegedly less probable than in the switch market because R & D costs, normally the prime source of cross-subsidization, are so low.[22]

Even if we did accept the DOJ's market forecasts and regulatory assessments wholesale, it would not suffice to compel removal of the telecommunications equipment restriction under the section VIII(C) standard. As we discussed above in Part II(C), the possibility of self-dealing bias in the telecommunications equipment market poses dangers to competition that do not exist in the other markets the BOCs seek to enter. The DOJ's submissions provide little solace against those dangers. As we noted above, the DOJ "assumes that any BOC that manufacturers equipment would purchase substantially all of its requirement from its affiliate," presumably regardless of price or quality. While the BOCs and the DOJ contend that not all BOCs will produce each type of equipment and therefore dispute the district judge's conclusion that the BOCs would foreclose 70% of the telecommunications equipment market, there sems to be no dispute that some substantial portion (5-15%) of the equipment market will be foreclosed.

Such foreclosure, if combined with cross-subsidization, would appear to allow the BOCs, in effect, to raise prices (and therefore exercise a form of market power) in the foreclosed sectors of the equipment market by disguising inflated equipment prices as costs in the local exchange market. *See supra* Part II.C. To be sure, the DOJ ad-

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[22] Conversely, R & D costs are quite high in the fiber-optics sector of the transmission equipment market. Still, the DOJ submits that cross-subsidization is not a primary concern since the BOCs' competitors in that sector could respond in kind to cross-subsidization without suffering any competitive disadvantage.

vised the district court that FCC regulation would substantially reduce the risk of cross-subsidization. In its own reports on the two principal telecommunications equipment submarkets, the DOJ nevertheless concedes that the BOCs would possess both the incentive *and the ability* to cross-subsidize, at least somewhat. The DOJ and the BOCs nowhere explain, however, why any significant amount of cross-subsidization that, in practical terms, enables the BOCs to charge higher prices for the equipment it produces would not be akin to an exercise of market power that would impede competition in the telecommunications equipment market. At least in this first Triennial Review, it is not enough for the BOCs (independently or through the DOJ) to show that a significant number of stable competitors will be able to survive BOC entry. We think that the BOCs cannot meet their burden under section VIII(C) without also explaining why foreclosure combined with cross-subsidization does not *itself* pose a "substantial possibility that the BOC could use its monopoly power" in the telecommunications equipment market.

2. *Customer Premises Equipment*

The DOJ subdivides the CPE market into the private branch exchange ("PBX") market and the terminal equipment market. While it analyzed those sub-markets separately, the DOJ believes—for reasons similar to those offered for the telecommunications equipment market—that BOC entry into both would not threaten competition. The PBX market is described as "moderately concentrated"—with three major and many minor producers—but nevertheless competitive. The DOJ points out that the BOCs have been permitted to *provide* PBXs (as well as all other forms of CPE) since the decree, and that they therefore have always had the incentive to provide discriminatory interconnection. If allowed to produce PBXs, that discrimination could manifest itself through BOC manipulation of its local network or through dis-

criminatory dissemination of network information. We are assured, however, that the BOCs' *ability* to discriminate will be blocked, as it has been until now, by numerous obstacles, especially FCC regulation.[23] Similarly, any danger of cross-subsidization in the PBX market is dismissed by the DOJ as negligible.

The DOJ's argument with respect to the terminal equipment market is based again on the premise that no BOC could successfully discriminate against its rivals, either by way of interconnection or by failing to provide critical network information. Their ability to discriminate is asserted to be undercut somewhat by the advent of PBX use, as well as cellular and paging systems for which the BOCs do not even provide the interconnection with the terminal equipment and which all contribute to the prevalent use of standards in interconnection. Residual risk of discrimination, as well as the risk of cross-subsidization, are adequately prevented by FCC regulation.

While we certainly have some resrvations concerning the DOJ's assessment of the CPE market,[24] we are inclined to think that the question is much closer than it was for telecommunications equipment. Since the BOCs purchase only a minute percentage of the nation's CPE output, there is no risk of the combined cross-subsidization and foreclosure that is so crucial to our decision on telecommunications equipment. Indeed, on appeal, the BOCs and the DOJ complain primarily that when the district judge discussed foreclosure, he did not differentiate between CPE and the various types of telecommuni-

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[23] Among the regulations relied upon, however, were the new *Computer III* and *Joint Cost* rules which were not fully implemented at the time this case was submitted to the district court.

[24] For instance, we question the DOJ's reliance on not-yet-final regulations as well as its apparent equation of FCC success in regulating CPE *provision* by the BOCs with its ability to regulate their CPE manufacturing. It would seem that manufacturing offers far greater opportunities for discrimination in interconnection.

cations equipment that the BOCs do purchase themselves in great quantity. While we agree that different competitive concerns should motivate decisions regarding CPE than those regarding telecommunications equipment, we do not perceive that as a reason to upset the district court's decision as it applies to CPE manufacturing. The burden under section VIII(C) is not is not on the district judge; it is on the petitioning BOCs to show that they can enter certain markets without raising a substantial possibility that they could use their monopoly power to impede competition in those markets. In this Triennial Review, the BOCs petitioned for *complete* removal of the manufacturing restriction, and the DOJ explicitly urged the district judge *not* to distinguish between the two types of equipment in making his decision, because line-drawing between them is so different. Given the risks to competition we identified in the telecommunications equipment market, the district court understandably did not allow the entire manufacturing destriction to be removed in this first Triennial Review, and the motions were properly denied.

C. *Information Services*

The BOCs and the DOJ also appeal from the district court's decision not to lift the restriction on "information services" under section II(D)(1), as that restriction is applied to the *generation* of information.[25] The district court found that there had "been no significant, relevant change in" market conditions justifying removal of this restraint under section VIII(C). 673 F.Supp. at 564.

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[25] Under the Decree,

> "Information service" means the offering of a capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications service.

Decree § IV(J), *reprinted in* 552 F.Supp. at 229.

Noting that neither the DOJ nor AT & T opposed lifting the information services ban, the BOCs contend that the district court should have reviewed this question under a more flexible "public interest" standard pursuant to section VII. *See supra* note 6. We agree, and hold that the district court erred in applying section VIII(C) to the uncontested motion to remove the line-of-business restriction on information services. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we are constrained to remand the case for further consideration of the BOCs' motion to remove the information services ban in its entirety.

1. *The Applicability of Section VII to Uncontested Motions to Modify a Line-of-Business Restriction Under the Decree*

It is well established that a less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one. *See generally* Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH.L.REV. 134, 135 (1985). As we have explained, unless the parties have expressly agreed otherwise, an antitrust defendant can prevail on a contested motion to reduce or eliminate its obligations only if it can make "a clear showing of grievous wrong evoked by new and unforeseen conditions." *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932). But when all parties to a decree assent to a particular modification, the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the "public interest." *See, e.g., United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984); *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D.Mich.1985).

Through section VIII(C), the parties expressly altered this "common law" approach to decree modification. The question is *how much* they altered it. According to the BOCs, Section VIII(C) was intended merely to supplant *Swift*'s "grievous wrong" standard for *contested* modifications of the decree's line-of-business restrictions; *uncontested* motions to lift these restrictions, the BOCs argue, remain subject to the ordinary public interest standard as incorporated in section VII's general provision for modification of the decree.[26] Because neither AT & T nor the DOJ opposed the BOC's motion to remove section II(D)(1)'s information service restriction,[27] the BOCs conclude that the district court should have reviewed their motion under a public interest test rather than under section VIII(C)'s "no-substantial-possibility" test. The appellees reply that section VIII(C) furnishes the exclusive mechanism for modifying the decree's line-of-business restrictions.

Whether section VII or section VIII(C) governs an uncontested motion to modify section II(D) is not a mere academic question. By focusing on whether a particular uncontested modification is in the public interest, section VII allows the district court to approve an uncontested modification even without a showing of a "change" of any kind so long as the resulting array of rights and obli-

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[26] The DOJ, in contrast, premises its challenge to the district court's information-services ruling solely on the ground that the court misapplied *section VIII(C)*.

[27] Although the appellees suggest that AT & T did not *consent* to removal of the Decree's information-services restriction, it is clear from the record that AT & T did not *object* to such a modification of the Decree. *See* Joint Appendix 2695-96; *see also id.* 1402. The district court did not suggest otherwise. *See* 673 F.Supp. 534 & n. 33 (characterizing AT & T's position as "suggest[ions]" as to alternative "routes with respect to the information services restriction"). For purposes of identifying the proper standard of review, the critical point is that neither AT & T nor the DOJ *opposed* the BOCs' motion.

gations is " 'within the reaches of the public interest' " today. *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (quoting *United States v. Gillette Co.*, 406 F.Supp. 713, 716 (D.Mass. 1975)), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 638, 70 L.Ed.2d 617 (1981).

To determine whether the parties intended section VII or section VIII(C) to apply to uncontested motions to modify the decree's line-of-business restrictions, we must look first to the text of the decree, and then, if the question remains subject to doubt, to " 'contemporaneous statements of [the decree's] objectives.' " *United States v. Western Elec. Co.*, 894 F.2d 1387, 1390-91 (D.C.Cir. 1990) (quoting *United States v. Western Elec. Co.*, 846 F.2d 1422, 1427 (D.C.Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 306, 102 L.Ed.2d 325 (1988)). This inquiry convinces us that unconftested motions to modify line-of-business restrictions should be resolved pursuant to a public interest standard under section VII.

Contrary to the contentions of the appellees, the applicability of section VIII(C) is not dictated by the plain meaning of its terms. Section VIII(C) does not purport to be the *exclusive* standard for reviewing motions to modify restrictions imposed by section II(D). Indeed, as we have noted above, insofar as section VIII(C) makes removal of a restriction contingent "upon a *showing* by the *petitioning* BOC," 552 F.Supp. at 231 (emphasis added), this provision appears to contemplate adversarial testing of the relevant issues. At best, section VIII(C) must be deemed to be silent on the question of what standard applies to uncontested motions to remove the decree's line-of-business restrictions.

The circumstances surrounding the formation of the decree, however, leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII. When the parties initially submitted the decree to the district court, the only provision for modification was section VII. In ex-

plaining their understanding of that section, both parties stated that "[i]n the event that the parties agree to an amendment of the modification to remove [a line-of-business] restriction, the standard for such removal would be whether it is in the public interest." Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32, *reprinted in* J.A. 882; *see* AT & T Brief in Response ot the Court's Memorandum of May 25, 1982 at 17-18, *reprinted in* J.A. 849-50 (stating same view).

The addition of section VIII(C) cannot be viewed as altering this understanding. The district court conditioned approval of the decree on adoption of section VIII(C) in order to alter the parties' stated intention that *contested* motions to remove a line-of-business restriction be granted merely upon a finding "that 'the rationale for [the restriction] is outmoded by technical developments.' " 552 F.Supp. at 195 (quoting Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32-33, *reprinted in* J.A. 882-83); *see also* AT & T Brief in Response to the Court's Memorandum of May 25, 1982 at 18, *reprinted in* J.A. 850 (expressing same standard). The trial court expressly noted that the standard in section VIII(C) would supplant "[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*" 552 F.Supp. at 195 n. 266 (emphasis added) (citation omitted). Nothing in the court's opinion suggests that section VIII(C) was designed in addition to displace the parties' agreement that a public interest standard would apply to *uncontested* motions to modify section II(D).

This reading of the decree is further supported by an important general rule of decree construction, namely, the presumption that the parties, "absen[t] any expressly stated intention to the contrary," intended to adopt "the ordinary substantive . . . standards that attend decree modification." *United States v. Western Elec. Co.*, 894

F.2d 430, 436 (D.C.Cir.1990). As we have explained, the only *express* intention relating to section VIII(C) was that it would displace the *Swift* test for reviewing contested modifications.

2. *Application of the Public Interest Test to the Motion to Remove the Restriction on Information Services*

Having determined that section VII's public interest test governs uncontested proposals to modify the decree's line-of-business restrictions, we must next examine whether the district court's erroneous reliance on section VIII(C) affected the court's decision to deny the BOCs' unopposed motion to remove the decree's restriction on information services. We conclude that it did, and, consequently, we reverse.

As we have indicated, section VII and section VIII (C) involve different inquiries. Section VII's public interest test directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*. *Cf. Bechtel Corp.*, 648 F.2d at 666. Section VIII(C) requires the district court to determine whether the petitioning BOC has shown that it could not impede competition in the relevant market as it was believed it could *when the decree was approved*; applying this standard, Judge Greene denied the BOCs' motion to remove the information-services restriction because he found that "[t]here has been no change whatever in" the information services market. 673 F.Supp. at 565.

Under only two circumstances could we discount the possibility that the district court would have reached a different result had it applied section VII rather than section VIII(C). The first would be if the inclusion of the information services restriction was mandatory, not merely permissible, at the time that the decree was

adopted. If market conditions or assumptions in 1982 so constrained the range of permissible settlements that *only* a decree incorporating this restriction could have been approved as consistent with the public interest *then*, it would follow that the parties would need to show that those conditions had abated before the court could approve removal of the restriction *today*.

We cannot say, on the record before us at least, that this condition is met. The Government's case in the *AT & T* antitrust litigation centered exclusively on AT & T's activities in the interexchange-service and equipment-manufacturing markets. *See, e.g.*, COMPETITIVE IMPACT STATEMENT IN CONNECTION WITH PROPOSED MODIFICATION OF FINAL JUDGMENT, 47 Fed.Reg. 7172 (1982). Indeed, because the 1956 consent decree enjoined AT & T "from engaging . . . in any business other than the furnishing of common carrier communications services," *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246, at 71,138 (D.N.J.1956), and because relatively few information services were provided to the public before the DOJ moved to reopen that decree in 1974, there really was no record to speak of concerning AT & T's activities in the information services market. The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how divestiture of AT & T would affect the development of this embryonic market. Under these circumstances, it would not have been legal error for the district court to approve the decree had the parties *not* agreed on their own to include the restriction on information services. Consequently, the district court's bare finding that the BOCs failed to show a *change* in market conditions does not suffice to show that the decree, absent the information services restriction, would no longer be " 'within the reaches of the public interest.' " *Bechtel Corp.*, 648 F.2d at 666 (quoting *Gillette Co.*, 406 F.Supp. at 716).

The second condition under which we could disregard the district court's reliance on section VIII(C) would be

if the record conclusively showed that, regardless of whether the parties were *obliged* to include the information services restriction in 1982, removing it would be against the public interest now. Because the "public interest" test must take its meaning from the nation's antitrust laws, *see American Cyanamid Co.*, 719 F.2d at 565, the appropriate question under section VII is whether the proposed modification would be certain to lessen competition in the relevant market. *See generally* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 330, at 141-42 (1978) ("To remain consistent with antitrust policy, the court should revise the decree that is shown to lessen competition substantially in present circumstances."). Purporting to find that the BOCs would have both the incentive and the ability to cross-subsidize the information-service operations of unregulated affiliates and to discriminate against information-service competitors, the district court concluded that removal of section II(D)(1)'s restriction on information services would be *anticompetitive* under current market conditions. 673 F.Supp. at 565-67.

But because we cannot be certain that these findings were not infected by the court's legal error concerning the proper standard of review, we may not rely on them to support the district court's denial of the BOCs motion. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982). The district court's analysis of the contemporary risk of anticompetitive behavior repeatedly incorporates the failure of the BOCs to show a change in market conditions from those existing when the decree became effective:

> There still has been no *significant, relevant change* in the situation.

673 F.Supp. at 564 (emphasis added).

> It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to en-

> gage in anticompettive conduct *remains* the same as it was when the decree was entered. The answer is plain. *There has been no change whatever* in this respect since 1984. . . .

Id. at 565 (emphasis added).

> In short, the reasons cited by the Court in 1982 and in 1984 *are as valid today as they were then.*

Id. at 567 (emphasis added). Consequently, we cannot be sure whether the district court's findings of anticompetitive risk stemmed from its *de novo* assessment of the evidence.

Nor can we say that "the record permits only one resolution of the factual issue[s]" pertinent to determining whether lifting the information-services prohibition would be pro- or anticompetitive. *Pullman-Standard*, 456 U.S. at 292, 102 S.Ct. at 1792. To be sure, the district court had before it evidence to support its findings on the risk of discrimination and cross-subsidization. But the record also contains considerable evidence cutting the other way. The *Huber Report*, in particular, discounts the prospect of anticompetitive behavior, citing the ability of competing information-service providers to bypass the BOCs' local-exchange networks, *see Huber Report* at 6.8, 6.17-6.21, the existence of nontelecommunications substitutes for information services, *see id.* at 6.21-6.23, and the lack of common costs between local-exchange services and *the generation of information, see id.* at 6.35.[28] Because resolving these disputed factual issues "would be wholly inconsistent with the function of an appellate court,"

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[28] As Dr. Huber notes:

> [T]he preparation of the information content itself is one activity that [the BOCs] would have notably little opportunity to cross-subsidize. Running a local telephone exchange does not require reporters, copy editors, joke writers, financial analysts, astrologists, or other information-content providers.

Id. at 6.35 (footnote omitted).

Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 984 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985), we are constrained to remand the case for further factfinding, pursuant to the proper legal standard. *See Pullman-Standard*, 456 U.S. at 292, 102 S.Ct. at 1792.

In sum, we find that the district court erred in applying section VIII(C) rather than section VII's public interest standard to the BOC's unopposed motion to lift the decree's information-services restriction in its entirety. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we reverse the court's decision and remand the case for further proceedings. In reconsidering the BOCs' motion, the district court should determine whether removal of the information-services restriction as applied to the generation of information would be anticompetitive under *present* market conditions.[29] The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best* serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of the public interest.'" *Bechtel Corp.*, 648 F.2d at 666 (quoting *Gillette Co.*, 406 F.Supp. at 716 (emphasis added).

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[29] We are also concerned with the practical difficulty of enforcing a merely *partial* repeal of the information-services ban; as the trial court recognized, significant disputes can be expected to arise concerning whether the BOCs are using their right to transmit the information of others as a cover for generating their own. *See* 673 F.Supp. at 596. Because it is clearly in the public interest to minimize the district court's oversight responsibilities under the decree, *see id.* at 599, the district court on remand should also consider whether the residual anticompetitive risks associated with lifting the restriction on generation of information are sufficiently great to outweigh the administrative burdens on the court of policing this limited prohibition.

IV.

The Public Service Commission of the District of Columbia ("DC-PSC") is the only party that appeals the district court's decision to allow the BOCs to participate in non-telecommunications markets and limited information transmission and storage activities.

The BOCs assert that in the absence of some actual or threatened injury to DC-PSC or some congressional enactment conferring standing, DC-PSC has no right to appeal the district court's decision. DC-PSC responds that it was granted the status of a limited intervenor in the district court proceedings and that it has the right to appeal the district court's judgment. DC-PSC bases this claim on an unclear combination of the following reasons: the district court granted the right to appeal its decision to all limited intervenors; the district court's decision to lift the restrictions at issue will cause DC-PSC to suffer specific injury as consumer and regulator; the law of standing applies only to plaintiffs and not to intervenors; an agency may intervene in an appeal from proceedings that may affect its ability to carry out its statutory functions; and DC-PSC may represent the interests of District of Columbia residents on appeal in a *parens patriae* capacity.

As a preliminary matter, despite the BOCs' assertions to the contrary, DC-PSC was a limited intervenor in both district court decision under review. By its order dated March 9, 1987, the district court granted DC-PSC's motion for leave to intervene. On October 14, 1988, the district court ordered that all those parties that had been granted limited intervenor status on February 26, 1987 in the proceedings that culminated in the issuance of the September 10, 1987 decision were to be considered limited intervenors for purposes of the decision issued on March 7, 1988. Because DC-PSC's motion to intervene was filed out of time and was granted on March 9 instead of on February 26, the BOCs assert that DC-PSC

is not a limited intervenor with respect to the March 7 decision. Although the BOCs may be technically correct, it would be unduly formalistic for this court to convert an obvious oversight of the district court into an independent basis for barring appeal.

DC-PSC's status as an intervenor does not, however, guarantee that it has standing to appeal the district court's decisions. DC-PSC seems to be under the impression that the district court, by conferring the status of limited intervenor in the proceedings below, can confer standing on DC-PSC in this court to appeal the district court's decisions. The Supreme Court has stated, however, that

> [a]lthough intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 [65 S.Ct. 1166, 1167, 89 L.Ed 1649] (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.

Diamond v. Charles, 476 U.S. 54, 68, 106 S.Ct. 1697, 1706, 90 L.Ed.2d 48 (1986). Thus, because DC-PSC alone challenges the district court's decision to lift the restrictions at issue, this court must determine whether DC-PSC independently satisfies the article III requisites for standing to appeal.

The Supreme Court has held that in order to have standing, a party must demonstrate an injury in fact fairly traceable to the conduct it is challenging and likely to be redressed by the relief it has requested. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). While the necessary "injury" is not susceptible to precise definition, it must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), and not

merely hypothetical, abstract, or conjectural. *Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 1664-65, 75 L.Ed.2d 675 (1983). As noted above, DC-PSC claims to be constitutionally "injured" both as consumer and regulator. We disagree.

DC-PSC's argument that it has standing as a consumer, if accepted, would mean that any consumer of telecommunications service in the country would have standing to challenge the consent decree. This is far too broad; it approaches the kind of diffuse and unparticularized "taxpayer" standing that the Supreme Court consistently has rejected. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82, 102 S.Ct. 752, 760-64, 70 L.Ed.2d 700 (1982).

DC-PSC's claim that it has standing because its regulatory function could be impaired by the removal of the restrictions at issue is equally unpersuasive. It is hard to see exacly how DC-PSC's ability to regulate could be harmed by the district court's judgment. Even though DC-PSC has no power to regulate Bell Atlantic, it does regulate Bell Atlantic's subsidiary, Chesapeake and Potomac Telephone Company ("C & P"). The fact that Bell Atlantic might inappropriately cross-subsidize other businesses by drawing funds from C & P—and thereby reduce the quality or increase the cost of service to C & P's customers—does not impede DC-PSC's power to require C & P to provide reasonably safe and adequate service at just and reasonable rates to its customers. DC-PSC may claim injury as a regulator only if it can demonstrate that cross-subsidization would prevent it from *regulating* C & P; it has not done so.

Finally, we reject DC-PSC's contentions that it can bring this appeal in a *parens patriae* capacity. Section 15c of Title 15 of the United States Code provides that any attorney general of a state may bring a civil action

in a *parens patriae* capacity to secure relief from antitrust violations. "State attorney general" is defined as

> the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this title, and includes the Corporation Counsel of the District of Columbia. . . .

15 U.S.C. § 15g(1). The BOCs argue that this language means that only the Corporation Counsel is authorized to bring such actions. DC-PSC argues that the grant is not exclusive, because DC-PSC's General Counsel is implicitly authorized to bring § 15c actions by D.C. Code § 43-405, which authorizes the General Counsel "to commence and prosecute all actions and proceedings directed or authorized by the Commission." On balance, we conclude that the general grant of power in § 43-405 is insufficient to authorize § 15c suits by DC-PSC's General Counsel in the absence of some more explicit authorization by Congress or the District of Columbia Council.

V.

With the exception of the district judge's ruling dealing with information services—which we reverse and remand—we affirm.

So ordered.

APPENDIX D

EXCERPTS FROM U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION MANUAL

CONSENT DECREE STANDARD PROVISIONS

Dated October 18, 1987
(Second Edition)
Page IV-76

* * * *

9. *Retention of Jurisdiction*

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

10. *Statement of Public Interest*

Entry of this Final Judgment is in the public interest.

Dated:

_____

[Name]
United States District Judge

STATUTES INVOLVED

APPENDIX E

Sections (e) & (f) of The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e) & (f)

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing on the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or

advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.